CAMPAIGN FINANCING AND THE CONSTITUTION

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Introduction

In the past few years, numerous proposals have been suggested to control political campaign financing practices. These plans vary in a number of ways. Suggested approaches include restricting the size of contributions, limiting the expenditures of candidates, requiring disclosure of contributions, and using government subsidies. Each type of measure gives rise to a different set of constitutional questions, discussed at length below. At the outset, however, some general observations are warranted.

The electoral process is at the very heart of constitutional government; it is to a large degree the ultimate arena in the competitive struggle of ideas. As stated by Justice Frankfurter in *United States v. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*[1]: "Speaking broadly, what is involved here is the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process. This case thus raises issues not less than basic to a democratic society."

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1 352 U.S. 567, 570 (1957).

Far from making constitutional analysis simpler, however, the fact that fundamental values are at stake may serve only to intensify difficulties. In connection with some of the legislative proposals under consideration, the same objectives tend to pull in opposite directions. For example, measures intended to equalize the competitive opportunities of major candidates may tend to discriminate against outsiders. Yet even between leading candidates, allowing supporters of one to spend unlimited sums may result in the overwhelming of the other.

The gravity of these problems argues for great reticence in tampering with the election process. But the status of the law, at least until recently, with its fragmented and largely ineffective restraints, ought not necessarily be regarded sacrosanct. The change in character of campaigns — especially the recent dramatic growth in importance of the use of television and radio — calls for a fresh look. To decide to take no action is itself a form of decision. The presumption against interfering with the process does not necessarily dictate a commitment to paralysis; neither does it compel a system of total *laissez faire*. The goal of enriching the electoral system, through broadening the base of citizen influence and reducing inequities in the opportunities of candidates and their supporters to persuade the electorate, is a worthy one; it is not only consistent with but indispensable to the attainment of the most fundamental purposes of the Constitution.

Where, as here, we must deal not with absolutes but with the balancing of constitutionally protected interests, it is essential that we examine the values sought to be fostered by legislation under consideration. While different proposals are intended to serve these values in different ways, certain general objectives (overlapping, or even conflicting, to a degree) seem central: first, an electorate informed as to the qualities and views of candidates for public office; second, competition among candidates determined, to the greatest extent possible, on the basis of these qualities and views, undistorted by inequality of opportunity to communicate with the voters; and finally, reduction of the dependence of candidates upon comparatively small numbers of large contributors both order to reduce such contributors' influence and to prevent lack of such contributors or personal or family fortune from deterring

otherwise qualified candidates from running. A classical — and not inconsistent — formulation of these goals is that of Dr. Alexander Heard:

> (1) that sufficient money be available to sustain the great debate that is politics, which means to assure the main contestants an opportunity to present themselves and their ideas to the electorate; (2) that the needed sums be obtained in ways that do not inordinately weight the processes of government in favor of special political interests; and (3) that the system command the confidence of the citizenry whose governmental officials are chosen through it.[2]

Proposals intended to achieve these goals have taken a number of different forms which are not, in the main, mutually exclusive. Suggested legislation falls into the following major categories:

— Limits on contributions
— Limits on expenditures
— Reporting (and publicity) requirements
— Special controls on use of certain media
— Subsidies, incentives, and taxes

An additional range of issues may depend on the sanctions proposed for violation of these regulatory devices. In particular, criminal sanctions and provisions for forfeiture of the election by a violator give rise to distinctive problems.

Many of these measures are likely to tread, to at least some degree, upon fundamental values.[3] While in the main, the pertinent constitutional questions tend to break down into two categories: the sources of congressional authority (since the federal government is of limited powers), and restrictions imposed upon the exercise of such power by constitutional limitations. The constitutionality of broad general methods of control, rather than that

2 A. HEARD, THE COSTS OF DEMOCRACY, 430-31 (1960).

3 Some interesting issues have been deliberately excluded from this paper in order to facilitate concentration on the most important questions. For example, I have not gone into such matters as the standing of voters or others to challenge the constitutionality of the proposals discussed, or the possible difficulties that problems of mootness, ripeness, or the political question doctrine might place in their paths. I have also excluded from consideration the special constitutional questions relating to the Communist Party and other groups thought to be dedicated to violent overthrow of the government. Discussion of such questions would serve only to distract us from the difficult enough problems relating to more conventional political groups and activities.

of specific bills or proposals will be considered, special attention will be paid to two recent Acts of Congress designed to deal with some aspects of these problems.[4]

I. Limits on Contributions

A. *By Amount*[5]

1. Constitutional Provisions Authorizing Regulation

a. *Congressional Elections.* — Article I, section 4, of the Constitution states: "The Times, Places and Manner of holding Elec-

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4 An attempt has been made to point out, both in the text and in footnotes, relevant sections of Public Law 92-225, The Federal Election Campaign Act of 1971, signed into law by President Nixon on February 7, 1972 [hereinafter cited as Federal Election Campaign Act of 1971], which sets spending limits and contains reporting requirements. Attention will also be paid to titles VII and VIII of the Revenue Act of 1971, P.L. 92-178 (Dec. 10, 1971) [hereinafter cited as Revenue Act of 1971], which provides taxpayers with choice of a deduction or credit for limited campaign contributions and establishes a check off scheme whereby a taxpayer may check off one dollar of his income tax each year to finance presidential campaigns. Other federal statutes and some state legislation are also specifically mentioned. The major thrust of the article, however, is to consider the constitutionality of broad, general types of campaign financing proposals, rather than focusing on these new, untested compromises.

Principal types of regulation have been coupled with the objectives sought to be achieved in the following summary of the patterns of regulation by both the federal government and the states:

> 1. To meet the problems created by some candidates having more funds than others and by rising costs, limitations on expenditures were imposed.
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> 2. To meet the problems of candidates obligating themselves to certain interests, prohibitions were enacted against contributions from certain sources and ceilings placed on individual contributions.
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> 3. To prevent governmental power from being used in soliciting contributions, regulations protecting governmental employees were enacted.
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> 4. To provide the public, both during and after campaigns, with knowledge of monetary influences upon its elected officials and to help curb excesses and abuses by increasing the political risk for those who would undertake sharp practices, laws were enacted requiring public reporting of campaign fund data. H. Alexander, Regulation of Political Finance 1 (1966).

5 General limits on contributions have not been included in the statutes recently enacted by Congress. Section 203 of the Federal Election Campaign Act of 1971 does, however, amend 18 U.S.C. § 608 to include a prohibition on expenditures by candidates of their own funds or those of their immediate families, above certain limits. The constitutional questions involved in a limitation on what a candidate may spend on his own campaign would seem somewhat similar to those that would be engendered by a maximum on what others may contribute towards the campaign.

tions for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations. . . ." Regulation of who may contribute, and how much, to a congressional campaign is arguably part of the "Manner" of holding the elections, but the issue seems not to have been squarely presented at the Supreme Court level. What authority there is, however, indicates that this provision would authorize such controls.

Ex parte Siebold[6] upheld a conviction under a federal statute forbidding fraud, violence, and other abuses in connection with congressional elections.[7] The breadth of congressional authority under article I, section 4, was reaffirmed in dicta of Chief Justice Hughes, speaking for a unanimous Court in *Smiley v. Holm*,[8] referring to "Times, Places and Manner" as:

> comprehensive words [which] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and *corrupt practices*, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.[9] (emphasis added).

"Corrupt practices" had long been a phrase of art, not limited to bribery or undue influence — which a dictionary definition might suggest — but directly applicable to contributions excessive in amount or from a forbidden source.[10] In the *Smiley* opinion, the

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6 100 U.S. 371 (1879).

7 There are also suggestions in *Ex parte Yarbrough*, 110 U.S. 651, 666 (1884), that it was "a waste of time to seek for specific sources of the power to pass these laws," for the right to protect elections of federal officials from violence, corruption, and fraud could be sustained as an inherent attribute of sovereignty.

8 285 U.S. 355 (1932). The narrow issue in the case was whether a state legislature could apportion congressional districts despite the governor's veto.

9 *Id.* at 366.

10 *See, e.g.*, the Federal Corrupt Practices Act of 1925, 43 Stat. 1070, and the history of federal legislation in this area summarized in *United States v. U.A.W.*, 352 U.S. 567 (1957). Since *Smiley v. Holm*, 285 U.S. 355 (1932), counterparts of many of the provisions of what had been the Federal Corrupt Practices Act of 1925 — including the restraints on contributions — have been moved into title 18 (Crimes and Criminal Procedure) of the United States Code, and the remaining

Court defines "such Regulations" in article I, section 4 as "regulations of the sort which, if there be no overruling action by the Congress, may be provided by the legislature of the state upon the same subject."[11] Since the states would have plenary power to regulate campaign contributions (subject only to limitations such as those on free speech, with which we are not at this point concerned), it seems fair to conclude that congressional power was thought by the Court to be equally broad.[12]

The commerce clause[13] may serve as an independent ground for congressional authority over campaign contributions, if one is necessary. A great range of uses of the commerce power have been upheld by the Supreme Court, leaving an embarrassment of riches in the authorities that may be invoked to support this conclusion. Even if the contributed funds stay in one state, they may be spent on goods and services that have crossed state lines; or they may free other funds to be so spent; or the expenditures of one candidate may induce a flow of interstate contributions or expenditures to or by an opponent; or the total pattern of campaign financing may so affect interstate commerce that Congress may regulate an entirely intrastate aspect of it.[14]

Federal Corrupt Practices Act, 2 U.S.C. §§ 241-56 (1970), repealed by the Federal Election Campaign Act of 1971, § 405, was limited largely to reporting requirements. But this does not affect the meaning of the phrase at the time Hughes was writing, and indeed it is still used as a shorthand way of referring to the entire panoply of federal legislation on the subject of campaign financing.

11 285 U.S. at 367.

12 In the absence of an opinion of the Court, *Oregon v. Mitchell*, 400 U.S. 112 (1970) (the 18 year old vote case), offers little help on this question. While Justice Black, who cast the decisive vote in favor of validity of the statute as applied to congressional elections, based his conclusion on a broad reading of "Manner" in article I, section 4 (400 U.S. at 119-24), the four justices who voted with him on this issue did so on other grounds.

13 U.S. CONST. art. I, § 8, cl. 3.

14 The Court's latest expression on the subject, *Perez v. United States*, 402 U.S. 146 (1971), held that purely local loan shark activities may be regulated without proof of their effect on interstate commerce so long as the "class" of activities does affect commerce. The commerce power was apparently the basis for the prohibition of election contributions by public utility holding companies. 15 U.S.C. § 79(h)(2) (1970); Egan v. United States, 137 F.2d 369 (8th Cir. 1943). *See* Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1, 22 (1966). Indeed, if we choose to be whimsical, we might invoke *United States v. Darby*, 312 U.S. 100 (1941), which upheld minimum wage and maximum hour regulation of local employment in manufacturing intended for interstate commerce. Contributions do help "manufacture" a Congressman, who must cross state lines to take his seat.

The necessary and proper clause[15] might also be invoked to expand further the powers of Congress to regulate campaign contributions. If, for example, it were found that the power under article I, section 4, to regulate the manner of election of congressmen, although sufficiently broad to permit outlawing of corrupt elections, would not itself sustain prohibition of huge contributions as such, they could nevertheless be forbidden if in the judgment of Congress limitations on the size of contributions were an appropriate way to reduce the occasion for corruption.[16]

It might be contended that another source of federal regulatory power could be found in section 5 of the fourteenth amendment, which authorizes Congress to enact legislation to implement the provisions of section 1, defining United States citizenship and forbidding state abridgement of privileges and immunities, due process, and equal protection.[17]

The theory might be that large campaign contributions impair the political equality of the less affluent. This factor may be highly relevant with respect to questions concerning the effect of first amendment restraints on validity of contribution limitations, but it may add little to the *prima facie* powers of Congress in the area. Some nexus with state action would have to be shown, and neither individual contributions to candidates for federal office, nor their acceptance thereof, clearly meets that test. Perhaps state inaction, in failure of a state to protect fourteenth amendment rights in an area in which it has asserted legislative authority, would be sufficient.[18] It would seem, however, that whatever fourteenth amendment powers Congress has in this area would go no further than, if indeed as far as, its powers under article I, section 4 discussed above.[19]

15 U.S. CONST. art. I, § 8, cl. 18.

16 It should be noted that the necessary and proper clause augments not only "the foregoing powers"—i.e., those enumerated in article I, section 8—but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." If one of the reasons for limitations on contributions is to reduce the likelihood of improper influence of large contributors upon officeholders, it might be contended that such laws were necessary and proper to enable each House to "be the Judge of the Elections . . . of its own members. . . ." art. I, § 5, cl. 1.

17 *Compare* Katzenbach v. Morgan, 384 U.S. 641 (1966), *with* Oregon v. Mitchell, 400 U.S. 112 (1970).

18 *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

19 The right to vote in a congressional election—and hence the power of

b. *Presidential Elections.* — Congressional power to limit contributions in presidential campaigns cannot be predicated upon any constitutional provision analogous to the "Times, Places and Manner" clause of article I, section 4, relating to congressional elections. Authority is expressly conferred only with respect to "the time of chusing the Electors, and the Day on which they shall give their votes."[20] The provision that the electoral votes "shall be counted" — it is not clear by whom — at a joint session of both Houses of Congress[21] might suggest a power to reject votes cast by electors chosen in campaigns tainted by huge contributions. Stretched still further under the necessary and proper clause, it might sustain prohibitions on such contributions. There is just too much history to the contrary, however, for such a theory to be taken seriously.[22]

In fact, it is the state which "shall appoint, in such Manner as the Legislature thereof may direct" its presidential electors.[23] Nevertheless, this power of a state is not wholly free from federal control, especially if the electors are "appointed" by the voters, as they have been in large part since the early nineteenth century, and without exception since 1880.[24]

Congress to protect that right — is not dependent upon state action but is derived directly from art. I, §§ 2, 4. United States v. Classic, 313 U.S. 299, 315 (1941). Of course, to the extent that qualifications for voting are state imposed, there is state action. But state failure to impose restraints on campaign contributions is a different matter.

While Congress has power to implement the prohibitions on *state* action contained in the fourteenth amendment, there is no comparable grant of power to implement the restraints on *federal* action set forth in, for example, the first and fifth amendments. *But cf.* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); Bell v. Hood, 327 U.S. 678 (1946).

20 U.S. CONST. art. II, § 1, cl. 4.

21 U.S. CONST. amend. XII.

22 Compare the hesitant suggestion of the author that Congress might reject the votes of presidential electors casting their ballots contrary to the mandate of their constituents. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 31-37 (1968). Even this comparatively small step has consistently been rejected by Congress when the votes of "faithless electors" have been counted — most recently in January 1969, when a North Carolina elector chosen on a Nixon slate cast his ballot for Wallace. 115 CONG. REC. 170-71 (1969). Voiding a ballot or an entire election because of oversized contributions would be far more unlikely. Congressional action in the Hayes-Tilden election of 1876 is not in point. At issue there was the validity of the vote count in four states, and hence of the credentials of their electors.

23 U.S. CONST. art. II, § 1, cl. 2.

24 Oregon v. Mitchell, 400 U.S. 112 (1970); Williams v. Rhodes, 393 U.S. 23 (1968).

The first breach in the notion that state power in this area was exclusive came in *Ex parte Yarbrough*.[25] Two Reconstruction statutes which punished conspiracies to intimidate a person in the exercise of a constitutional right, and to prevent, by force, intimidation, or threat, a citizen entitled to vote from supporting a candidate for presidential elector or Congress were upheld. The indictment sustained involved only a congressional election, and was based on intimidation of Negro voters; hence this application of the statute could have been upheld under either article 1, section 4, or the power to implement the fifteenth amendment. But the Supreme Court went much further:

> That a government whose essential character is republican, whose *executive head* and legislative body are both elective . . . has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. . . . It is as essential to the successful working of this government that the great organisms of its *executive* and legislative branches should be the free choice of the people as that the original form of it should be so.[26]

Much more in point is *Burroughs v. United States*.[27] At issue was the constitutionality of a provision of the Federal Corrupt Practices Act of 1925,[28] requiring certain political committees, which accepted contributions or made expenditures for the purpose of influencing the election of candidates for presidential elector, to render financial reports. The power to require information involves quite different issues, of course, from the power to limit contributions. But the language of the Court was quite broad. First, the Court rejected the argument that the powers of Congress with respect to presidential elections were limited to setting the time of choosing electors and the time the electors were to cast their ballots.[29] It then expressed, in extremely broad terms, its

25 110 U.S. 651 (1884).

26 *Id.* at 657, 666 (emphasis added). See also both the "inherent power of sovereignty" theory of *Ex parte Yarbrough* and the accompanying quotation, *supra* note 7.

27 290 U.S. 534 (1934).

28 43 Stat. 1070; see note 10 *supra*.

29 290 U.S. at 544.

views of the power of Congress to control expenditures of money to influence election results:

> The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election *from the improper use of money to influence the result* is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.[30]

Still broader was the Court's statement as to the authority of Congress to select the means whereby presidential elections can be protected from corruption:

> The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.[31]

On its facts, *Burroughs* might be limited to disclosure laws. Its reasoning, however, would seem to encompass a much wider range of techniques for the control of the financing of presidential campaigns, including restrictions on the size of individual contributions.

Other grounds for congressional authority in this regard are available if necessary. For example, whatever was said above as to the applicability of the commerce power to congressional elections

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30 *Id.* at 545 (emphasis added).

31 *Id.* at 547-48. While this language is closely parallel to Chief Justice Marshall's exposition of congressional power under the necessary and proper clause in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), its employment in connection with the issue of congressional control over the financing of presidential elections seems significant.

would apply *a fortiori* to elections of the President. The impact of contributions upon interstate commerce would be much greater, and the actual crossings of state lines by people, money, tangible articles, and radio waves would be far more frequent.

As in the case of congressional elections authority under section 5 of the fourteenth amendment would probably depend on a showing of state action. The fact that the states retain more power over the mechanics of choosing presidential electors than they do in congressional elections would not seem significant, since there would still remain the problems arising out of the fact that the contributions themselves were individually made. It should be possible to make a plausible argument, under *Katzenbach v. Morgan*,[32] however, in support of a congressional finding that large contributions in state-conducted elections of presidential electors deprived poorer citizens of an equal voice. While the contributions would not constitute state action, the election influenced by them would be, and the limitation on contributions might be a reasonable means to achieve equal protection in the voting process.[33]

Some doubt as to the present significance of *Katzenbach v. Morgan* has been cast by the decision in *Oregon v. Mitchell*[34] in which five justices, in three separate opinions, voted that congressional power to implement the fourteenth amendment was not sufficient to sustain its grant of the vote to eighteen year old citizens. The absence of a satisfactory showing that eighteen year olds were a separate class of citizens subject to discrimination might serve to distinguish *Oregon v. Mitchell* if convincing evidence of inequality between rich and poor citizens in their respective political influence, as an effect of the tolerance of large contributions, were presented to Congress. But *Katzenbach v. Morgan* might also be distinguished, along the lines asserted by Justice Stewart in *Oregon v. Mitchell*, since poorer voters, like eighteen year olds, can scarcely be characterized as a "discrete and insular minority."[35]

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32 384 U.S. 641 (1966).

33 These problems will be considered in greater detail in the discussion below of constitutional limitations upon *prima facie* congressional power. See text at notes 47 to 73, *infra*.

34 400 U.S. 112 (1970).

35 *Id.* at 296. It would be premature to conclude that the Court is moving toward

c. *Primaries.* — A limitation on spending by a candidate in a primary for the Senate was held beyond the power of Congress in *Newberry v. United States*[36] on the grounds that primaries "are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors."[37] While the issue has not been squarely decided in a case questioning the validity of campaign finance controls, it is generally assumed that *Newberry* is no longer law. In affirming a conviction for denying the rights of voters in a congressional primary by falsely counting the ballots, the Court in *United States v. Classic*[38] effectively, although not explicitly, overruled *Newberry* by holding that a primary was part of the election process referred to in article 1, sections 2 and 4. *Classic* might be explained in part on the fact that in the particular contest at issue, victory in the primary was tantamount to election.[39] But more recent cases treating primaries as integral parts of the election process regardless of such special circumstances, although arising in different legal contexts, give ample basis for concluding that whatever powers Congress has over an election are matched by its powers over the primaries leading up to it.[40]

d. *State Elections.* — Congressional authority to limit contributions in elections for state office is somewhat less clear. There is no specific grant of power comparable to article I, section 4, in its application to congressional elections, and no inherent power corresponding to that which the federal government may have to

limiting the applicability of the fourteenth amendment in voting rights cases to those involving racial discrimination. *Cf.* James v. Valtierra, 402 U.S. 137 (1971); opinion of Black, J., in Oregon v. Mitchell, 400 U.S. at 126-30. *But cf.* Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Phoenix v. Kolodziejski, 399 U.S. 204 (1970); and, of course, the apportionment cases.

36 256 U.S. 232 (1921).

37 *Id.* at 250.

38 313 U.S. 299 (1941).

39 *Id.* at 320.

40 *Cf., e.g.*, Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Rice v. Elmore, 165 F.2d (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948). And when the effect of limitations, such as those of the first amendment, on *prima facie* congressional power is considered, it might well be concluded that the case is even stronger for regulation of primaries than for regulation of elections. Because money is often scarcer, candidates are more dependent on large contributors, who thereby gain an opportunity to exert added influence on the election process.

protect the purity of the election of its own offiers.[41] Nevertheless, other bases for congressional control over contributions in federal elections would seem to apply to state elections as well. Most of the same commerce clause arguments could be made, with almost the same force. Contentions based upon congressional powers to implement the fourteenth amendment might apply even more directly to state than to federal elections.

Moreover, in almost all states, elections of federal and state officers occur on the same days.[42] Also, most political activity is conducted by local party committees supporting both federal and state candidates of their respective parties. Contributions coming into such committees serve to assist both groups of candidates. Therefore control of contributions for federal elections would be greatly facilitated by control over state elections as well. In short, even if there were no other basis for such control, this point alone would probably suffice under the necessary and proper clause to sustain regulation of contributions for state elections.[43]

Nevertheless, doubts remain as to the scope of federal authority over elections for state office. To be sure, activities of state governments may be subjected to generally applicable federal regulatory and fiscal programs.[44] But, except where discrimination forbidden by the Civil War amendments is involved, federal regulation of elections to state office might be regarded as improper interference with the very functioning of a state as a governmental entity.[45]

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41 *See* United States v. Reese, 92 U.S. 214, 218 (1875).

42 *Cf. In re* Coy, 127 U.S. 731 (1888).

43 *Cf.* Houston, E. & W.T. Ry. v. United States, 234 U.S. 342 (1914); Note, *Statutory Regulation of Political Campaign Funds*, 66 HARV. L. REV. 1259, 1261-62 (1953). On the other hand, there was no suggestion in *Oregon v. Mitchell*, 400 U.S. 112 (1970), that the right of eighteen year olds to vote in federal elections was a sufficient ground for upholding their vote in elections for state office conducted simultaneously. But the practical problems of such a division in franchise eligibility undoubtedly spurred adoption of the twenty-sixth amendment.

44 *Cf.* Maryland v. Wirtz, 392 U.S. 183 (1968) (Fair Labor Standards Act); Case v. Bowles, 327 U.S. 92 (1946) (Emergency Price Control Act); United States v. California, 297 U.S. 175 (1936) (Federal Safety Appliance Act); Oklahoma v. United States Civil Ser. Comm'n, 330 U.S. 127 (1947) (application of Hatch Act to state employees in federally financed activities); New York v. United States, 326 U.S. 572 (1946) (federal tax on state sale of mineral waters).

45 Compare Justice Frankfurter in New York v. United States, 326 U.S. at 582:

> There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves.

The same arguments as to the inherent power of Congress to protect federal elections from undue influence might suggest the retention of a residuum of almost exclusive authority in the states over the elections of their own officers.[46]

2. Constitutional Provisions Limiting Regulation

While it seems reasonably safe to assume that there is presumptive authority on the part of Congress to impose controls upon the size of contributions to campaigns for federal office, there remains the question of the extent to which the exercise of this power may violate restrictions upon congressional authority. The first amendment expressly protects freedom of speech and of the press from congressional abridgement. It also implicitly protects the right to hear and to read, and the right to associate for political purposes. Limitations on a person's campaign contributions unquestionably impose restrictions upon his full freedom to communicate his views, a corresponding limitation on the ability of potential listeners to hear them, and a further limitation on the rights of both to associate. But these rights are not absolute, and determination of the constitutionality of restrictions upon them requires a weighing of the interests sacrificed against the goals and values sought to be achieved.

If limitations on the size of individual contributions impinge upon first amendment rights, to what extent do they actually do so, what public interests are served by the regulation, and on what basis should a balance be struck? Campaign contributions serve primarily to pay for seeking to persuade the electorate. Whether the contribution takes the form of the contributor hiring a hall in order to make a speech, or paying for an advertisement to present his views, or whether it serves to permit the candidate himself or a third person advocating his election to do these things, rights

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> Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State.

46 Cf. Oregon v. Mitchell, 400 U.S. 112, 125-29 (opinion of Justice Black), 170, 201 *et. seq.* (opinion of Justice Harlan), 293 *et seq.* (opinion of Justice Stewart) (1970).

presumptively protected by the first amendment are being exercised.

Significant distinctions should be noted, however. Spending money is not the same as speech-making, even if the former may foster the latter. Men may not be equal in lung power, but even Senate filibusters reveal that the capacity of any man to speak is finite. However, the things that unlimited sums of money can buy — recordings, sound trucks, the speeches of others, radio, and television programs — are subject to no comparable human limit. Both speaking and spending may be protected by the first amendment; but the degree of protection accorded need not necessarily be held to be identical.

In his vigorous dissent in *United States v. United Auto Workers*,[47] in which the majority of the Court did not reach the question of the validity of the prohibition on labor union campaign expenditures,[48] Justice Douglas emphasized the fact that the activity complained of was a form of speech, a radio broadcast in behalf of candidates, and the fact that it cost money to make the speech did not in his view "make the speech any the less an exercise of first amendment rights."[49] Nevertheless, he took pains to note: "If Congress is of the opinion that large contributions by labor unions to candidates for office and to political parties have had an undue influence upon the conduct of elections, it can prohibit such contributions."[50] More important, the level of the limitation imposed may be significant. If the evil sought to be averted is the undue influence of the large contributor upon the candidate or officeholder, a limit manifestly below the point of reasonable fear that the candidate might be improperly influenced by the contribution would be difficult to justify. If this is the sole reason for upholding ceilings on contributions, the present unenforced and loophole-ridden limit of $5,000 per year for a presidential or congressional campaign[51] is certainly ridiculous as applied to the

47 352 U.S. 567 (1957).
48 18 U.S.C. § 610 (1970).
49 352 U.S. at 594. (Chief Justice Warren and Justice Black joined in the dissent.)
50 *Id.* at 598, n.2. No authority was cited for this proposition, nor for the distinction suggested.
51 18 U.S.C. § 608 (1970).

former, and almost as surely so for the latter. Would the same be true, however, of a limitation of $500,000? $1,000,000? $10,000,000? There must come a point at which it is reasonable to assert that there is a serious threat to the integrity of government.

Perhaps the same quantitative factor is also relvant to the weight assigned to the other pan of the scale. First amendment values may be strongest where they enable a contributor to cause his views and those similar to this to be widely expressed and heard. Are they necessarily just as strong when his contributions are so disproportionate to the dimensions of the campaign as to blanket out all other voices?[52] And if it were demonstrable (which perhaps it is not) that contributions of over a certain size tended to reflect a a common point of view and support for a single candidate, might not Congress properly consider their potential cumulative influence upon government decision-making[53] in deciding at what level the limit is to be fixed?[54]

There may be additional gradations in the hierarchy of values subsumed under the first amendment. Just as the right to spend

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52 *Cf.* Associated Press v. United States, 326 U.S. 1, 20 (1945). In upholding antitrust regulation of certain restrictive practices of the Associated Press, the Court stated that the first amendment:

> rests on the assumption that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

See also Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

53 In United Public Works of America (CIO) v. Mitchell, 330 U.S. 75 (1947), upholding the limitations of the Hatch Act upon political activities of most classes of civil servants, the statute was tested against the case of a Mr. Poole, a mechanic employed as a roller in the mint. To the contention that any harm he could do to the integrity of the civil service would be minimal, the court replied:

> There are hundreds of thousands of United States employees with positions no more influential upon policy determination than that of Mr. Poole. Evidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively. It does not seem to us an unconstitutional basis for legislation.

Id. at 101.

54 Analogous questions, involving the relationship of quantitative factors to constitutionality, recur in the discussions of limitations on candidates' expenditures, size of contributions to be reported, and scale of subsidies and tax incentives. See text at notes 104, 167-68, and 214-16 *infra*, respectively.

for an election campaign may be less fully protected than the right to speak on behalf of a candidate, so too the right to speak may itself be subject to limitations that could not be applied to the right to vote. The denial to most federal employees of the right to speak or write on behalf of a candidate was upheld in *United Public Workers of America (CIO) v. Mitchell*[55] but the Court carefully emphasized that the statute "leaves untouched full participation by employees in political decisions at the ballot box."[56]

First amendment rights are intended not only for the protection of the person who wants to communicate, but at least equally for the person who wants to receive the communication. The two cannot be completely dissociated. Moreover, where campaign speeches and publications gush forth at a great rate, the continued desire of the audience to receive more of the same may be questioned. Nevertheless, in any weighing of values, attention must be given to the right of the potential audience to hear broadcasts,[57] read newspapers and periodicals,[58] acquire education,[59] and generally "receive information and ideas."[60]

Still another constitutional right arguably diminished by limitations on contributions is the right of association.[61] While not specifically mentioned in the Constitution,[62] this right has been recognized by the courts, especially where the association is for political purposes.[63] Although it might be thought to add little to the case against limitations on the size of campaign contributions,[64]

55 330 U.S. 75 (1947).

56 *Id.* at 99.

57 *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

58 *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

59 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

60 *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 564 (1969).

61 *See generally*, Fellman, *Constitutional Rights of Association*, 1961 SUP. CT. REV. 74 (1961).

62 This is so to the extent that the first amendment includes the right of assembly. The latter was said by the Supreme Court to be inherent in a republic, antedating the Constitution. United States v. Cruikshank, 92 U.S. 542, 552 (1875). But it is clear that the modern right of association is not limited to assemblages of people in physical proximity. *See* Fellman, *supra* note 61, at 101 *et seq.*

63 *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 30-31 (1968); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957).

64 One may generally join a political association with only a nominal contribution, if any. While there may be special clubs of those who have contributed more than, say, $10,000 to a political party, and fund raising dinners whose price is many times the fair value of the food and beverages served, it probably cannot be

freedom of association may well include not only the right to belong, but also the right to play a meaningful role in an effective organization.

If campaign contributions are intended to influence the way people will vote, large ones would tend to exert proportionately greater influence. The Supreme Court has in recent years held that equality of voting power was constitutionally protected, not only in the apportionment cases but also in cases overturning state laws that imposed financial burdens[65] or property qualifications[66] upon the right to vote. The Court announced that inequalities of that sort would not be sustained on the basis of the usual equal protection standard, namely, a rational state interest justifying the difference in treatment; instead, to sustain inequality in voting rights based upon financial considerations, a compelling state interest would have to be shown.[67]

Of course, inequality in the power to persuade voters (whether for financial or other reasons) is not the same as inequality in the right to vote. Even assuming that the limitations imposed upon the states by the equal protection clause just as fully bind the federal government through the due process clause of the fifth amendment,[68] we are not likely to encounter a serious argument that this line of cases stands for the proposition that Congress is *compelled* by the Constitution to eliminate disparities in political influence resulting from the differences between rich and poor in their ability to make large campaign contributions.

These differences are not necessarily irrelevant when it comes to balancing the values served by limitations on contribution size against the rights diminished. If financial barriers to the right to

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seriously contended that those are the sorts of associations that the Constitution protects.

65 Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); *cf.* Bullock v. Carter, 92 S. Ct. 849 (1972), invalidating burdensome filing fees imposed on candidates seeking to enter primaries.

66 City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969).

67 Kramer v. Union Free School Dist., 395 U.S. 621, 633 (1969).

68 While *Bolling v. Sharpe*, 347 U.S. 497 (1954), invalidating school segregation in the District of Columbia, is often cited for this proposition, the Court was careful not to imply that all of the specific restraints imposed by the equal protection clause necessarily apply with equal force to the federal government under the due process clause. *Id.* at 499.

vote are constitutionally forbidden, there is a legitimate argument that reduction of financial barriers to the right to influence voters is constitutionally *permitted.* And if the Constitution requires that each man's vote count equally, may not that fact be deemed pertinent in consideration of the validity of measures intended to reduce inequalities in men's opportunities to affect the vote? This rationale permits the sustaining of lower limits on the size of contributions than does the rationale of preventing undue influence by contributors on candidates and officeholders.

Finally, in weighing the validity of an infringement of freedom, it is relevant to consider whether substantially the same objectives can be accomplished by means that impinge less upon constitutional rights.[69] As stated in *Shelton v. Tucker*:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[70]

Perhaps the goals sought to be achieved by limitations in the size of contributions[71] may be attained in part or in whole by other

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69 *Cf., e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); *but cf.* Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

70 364 U.S. 479, 488 (1960).

71 One other method of limiting the amount of contributions should be mentioned. The present tax law apparently subjects campaign contributions to the gift tax. Since there is an annual exemption of $3,000 per donor as to gifts to each donee (which becomes $6,000 when a husband and wife join in the gift), only the larger contributions become subject to the tax, making the tax potentially valuable for discouraging oversized contributions. A recent decision holds, however, that if the taxpayer can show an economic reason for making the contribution, the gift tax is inapplicable. Stern v. United States, 436 F.2d 1327 (5th Cir. 1971), *affirming* 304 F. Supp. 376 (E.D. La. 1969). If this decision is ultimately followed, the effectiveness of the gift tax, in precisely the situations where it might be most useful in deterring harmful political practices, would be seriously threatened.

If each gift to each committee is treated separately, however, we are left with a serious loophole. Some changes, perhaps requiring cumulation of all gifts for any political cause within a single year, might make the tax a more useful tool for our purposes.

Gift tax rates as applied to political contributions could be sharply increased, particularly in the higher brackets. But the taxing power, like other sources of congressional authority, is subject to constitutional limitations, such as those in

devices — government subsidization of campaigns; tax incentives to encourage large numbers of small contributions; effective disclosure and publicity; and limitations on what a candidate may spend. Most of these alternatives themselves may give rise to constitutional difficulties, and it may also be unclear whether certain of the alternatives would be likely in fact to achieve the desired results.[72] Nevertheless, the present subject (limitation on the size of contributions), as well as the other devices to be considered below, should not be evaluated entirely in isolation from one another, but also with a view to determining in what ways the maximum benefit could be achieved with the least diminution of constitutional rights.[73]

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the first amendment. The higher the tax rate, the more nearly we would be approaching the situation of the outright prohibition on campaign contributions over a specified amount, and some of the problems of balancing of values, discussed above in that context, would become pertinent here. *Cf.* Grosjean v. American Press Co., 297 U.S. 233 (1936).

72 As noted above, the choice of means to achieve a legitimate end is normally one for congressional determination.

73 If the problem of presumptive federal power to regulate elections for state office is overcome, issues concerning limitations such as those of the first amendment would seem to be somewhat similar to those raised in connection with federal elections. In fact, it might be contended that the need for control is often even greater in the state area, because of the smaller dimensions of most campaigns and the proportionately greater influence of large contributions. But the *federal* interest in guarding against abuses would seem to be much more limited.

An entirely distinct problem is the extent to which federal regulation of contributions — whether for federal or state elections — invalidates state laws on the subject. If Congress is acting constitutionally, it can displace inconsistent state law if it so chooses. U.S. CONST. art. VI, § 2. And, with respect to federal control of the "Manner" of congressional elections, state authority is specifically subject to supersession by Congress.

To avoid ambiguity and resulting litigation, it is often important for Congress to state clearly its intentions in this regard. Section 403 of the Federal Election Campaign Act of 1971 may give rise to some problems of interpretation. On the one hand, subsection (a) provides that "[n]othing in this Act shall be deemed to invalidate . . . any provision of any State law, except where compliance with such provision . . . would result in a violation of a provision of this Act." On the other hand, subjection (b) declares that "[n]otwithstanding subsection (a), no provision of State law shall be construed to prohibit any person from taking any action authorized by this Act or from making any expenditure . . . which he could lawfully make under this Act."

A different provision of this Act, section 104(d), eliminates the preemptive effect of the Federal Communications Act to the extent of allowing states to enact provisions limiting broadcasting expenditures of candidates for state and local office, comparable to those directly provided by the Act with respect to candidates for federal office.

B. *By Type of Contributor*

1. Corporations

The earliest "corrupt practices" to attract public attention and the first to be dealt with by federal legislation were the actions of corporations in contributing heavily to political campaigns.[74] Laws forbidding corporate contributions are still in effect.[75] Are there any serious questions as to their constitutionality?

The basic authority of Congress may be roughly the same with respect to corporations as it is in connection with restrictions on the size of individual contributions. Such possible grounds for federal control as the power to control the manner of electing members of Congress and the right to prevent corruption of federal officials would seem to be equally applicable. The ability of corporations to accumulate large amounts of money for concentrated application in support of a candidate[76] was the principal concern in the early drive for campaign finance regulation.[77] On a generalized basis, corporate activities tend to have greater impact on interstate commerce than do those of individuals.

The present prohibition against corporate contributions differs from limits on individual contributions in that it is total, rather than merely the imposition of a ceiling. Hence, even an extremely small contribution by a corporation which could not conceivably exert improper influence on a candidate or official is forbidden. The suggestion that the size of the limit upon contributions by individuals may be relevant to its validity, may thus have some application here as well. Congressional power, however, is not normally circumscribed so sharply. Since the cumulative effect of a large number of small contributions from corporations with parallel interests might well be significant, they would seem to be subject to congressional control.[78]

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74 *See* United States v. UAW, 352 U.S. 567, 570-75 (1957).

75 18 U.S.C. § 610 (1970); officers, directors, and stockholders are, of course, not affected by this prohibition with respect to their individual contributions.

76 *See* Note, *Corporate Political Affairs Programs*, 70 YALE L.J. 821, 859-60 (1961).

77 *See* note 74 *supra*.

78 *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948); Wickard v. Filburn, 317

Turning to the constitutional limitations upon the presumptive power of Congress, it probably is easier to restrain corporate contributions than those of individuals. Corporations have some, but not all, of the constitutional rights of individuals. They enjoy the protection of the due process and equal protection clauses, but are not deemed to be citizens for purposes of the privileges and immunities clause. They have no privilege against self-incrimination and, most important in the present context, they cannot vote.

It is often pointed out, however, that the Supreme Court has repeatedly held corporations to be entitled to the protection of the first amendment.[79] But in each of these cases the corporation was itself in the business of communications; also, the expression protected was related to that function rather than to some extraneous corporate interest.[80] There is a clear distinction between an editorial, news article, or advertisement in a newspaper in support of a candidate and contributions by a corporation to finance speeches or advertisements in support of a candidate it believes to be friendly to its interests. While it is possible that both types of activ ity are protected, the issues are sharply different.

When a corporation engaged in the business of disseminating news or ideas asserts first amendment rights, one may ask whether the rights protected are those of the corporation[81] or those of the potential reader or listener. Since the Court has without comment permitted corporations to assert these rights, it may not matter whether they are deemed personal to the corporation or only derivative.[82] It may make a difference, however, whose rights are

U.S. 111 (1942); NLRB v. Fainblatt, 306 U.S. 601 (1939). While it is sometimes suggested that corporate contributions are ultra vires and that the prohibition serves the purpose of protecting dissenting stockholders, issues of corporate power are normally a matter of state law, which may be preempted by federal action only pursuant to some other grant of authority to Congress.

79 *See, e.g.*, Grosjean v. American Press Co., 297 U.S. 233 (1936); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

80 While the invalid tax in *Grosjean* was levied upon advertising revenue, the Court found that its purpose was to hinder the entire operation of the newspaper.

81 It might also be contended that rights of the stockholders of the corporation are involved; in theory, the corporation exists to serve their interests. It is unlikely, however, that a stockholder has a constitutional right to use a corporate device as a channel for campaign contributions.

82 In the special case of the broadcasting station, holding one of an inherently limited number of licenses, the Court stated, "It is the right of the viewers and listeners, and not the right of the broadcasters, which is paramount." Red Lion

being asserted when the corporation is not in the communication business. Individuals clearly have the right to express themselves. Communications media are essential to the dissemination of facts and ideas. But corporations not in these lines of business are certainly less vital to the flow of information and opinions to the public. Moreover, the right to communicate is one step removed from the right to contribute to an election campaign. Contributions from corporations — even those engaged in communication[83] — cannot be deemed, as can contributions from individuals, to be an extension of their right to vote and persuade others to vote their way.

Distinctions there may be, but doubts remain. Corporations may well have some rights, under the due process clause if not the first amendment, to communicate their views on matters relating to their interests — including election campaigns. In construing the prohibition on union contributions narrowly, to avoid constitutional issues, the Court said in *United States v. Congress of Industrial Organizations*:[84]

> If this law were construed to prohibit the publication, by *corporations* and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.[85]

Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). And a recent District Court decision dismissed an indictment of a national bank under 18 U.S.C. § 610 for having made a loan to a campaign committee, which was fully secured, at normal rates, and in the ordinary course of business. United States v. First Nat'l Bank of Cincinnati, 329 F. Supp. 1251 (S.D. Ohio 1971). The court said: "The evil in Section 610 is not that it prohibits the political expression of a national bank, but that it directly affects the political expression of individuals who may wish to utilize their assets to secure credit on behalf of a particular candidate." *Id.* at 1254. Section 205 of the Federal Election Campaign Act of 1971 has amended 18 U.S.C. § 610 (1970) to remove from its scope the application held invalid in this case.

83 *Cf., e.g.*, Associated Press v. United States, 326 U.S. 1 (1945), and Associated Press v. NLRB, 301 U.S. 103 (1937), rejecting contentions that news media were protected by the first amendment from such generally applicable regulatory measures as the antitrust laws and the National Labor Relations Act.

84 335 U.S. 106, 121 (1948).

85 (Emphasis added.) An attempt to accommodate this expression of concern was made in section 205 of the Federal Election Campaign Act of 1971, *amending* 18 U.S.C. § 610 to exclude from the definition of "contribution or expenditure," *inter*

Thus, the question of the constitutionality of prohibitions upon campaign contributions by corporations is not free from doubt. The ultimate resolution of the question may be fragmented, upholding the validity of the restraint on contributions of money but overturning applications that touch too closely upon the direct communication of ideas.

There are, in addition, more sweeping prohibitions against contributions by certain special types of businesses — public utility holding companies, national banks, federally incorporated companies, government contractors, and so forth. New legislation directs the FCC, CAB, and ICC to regulate the making of unsecured loans to political parties and candidates by businesses under their authority.[86] In the main, whatever differences there may be in these cases spring from the presence of further grounds for federal assumption of control. Yet, if there are additional potential abuses peculiar to the distinct nature of the contributor, they would weigh in the balance in determining whether such restraints as those imposed by the first amendment should apply. In the case of public utilities, for example, there might be reason to fear attempts to secure favors with respect to rate-making, or apprehension that the cost of the contributions might be passed on to the public. And there is an important public interest in seeking to keep the awarding of government contracts completely free from political influence.

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alia, "communications by a corporation to its stockholders and their families . . . on any subject." *See also* note 93 *infra*.

It might be noted, however, that Justice Douglas, dissenting from the avoidance of constitutional issues in United States v. UAW, 352 U.S. 567 (1957), on the ground that the same statute was clearly unconstitutional as sought to be applied to union payment for campaign broadcasts, stated that the problem was not peculiar to unions:

> It is applicable as well to associations of manufacturers, retail and wholesale trade groups, consumers' leagues, farmers' unions, religious groups and every other association representing a segment of American life and taking an active part in our political campaigns and discussions.

Id. at 593.

Strikingly, corporations were not specifically included in Justice Douglas' enumeration — only groups of corporations and the like. Evidently, the freedom he sought to protect was at least in part a freedom of association, and he did not regard the ordinary business corporation as an association in this respect.

86 Federal Election Campaign Act of 1971 § 401.

2. Labor Unions

The notion that there was public danger in the power of unions to accumulate funds to be used strategically in political campaigns arose much later than the belief that such activities on the part of corporations should be forbidden. The same statute[87] now prohibits contributions by either. In many respects, the constitutional issues regarding union contributions parallel those relating to corporations. While unions are not normally organized in corporate form, they are, like corporations, organizations representing the interests of individuals, and are entitled to some, but clearly not all, of the rights of individuals.

There are also some differences. Unions are formed by individuals, and are supposed to be governed by those individuals on a one-man-one-vote basis and to protect the interests of those individuals equally. Business corporations are governed quite differently — in theory on a one-share-one-vote basis,[88] but quite often, in fact, by a self-perpetuating management. Regrettably, this can also be said with respect to some unions. Also, corporate stock is not necessarily held or voted by individuals but often in large measure by other institutions. If one of the constitutional values pertinent to our inquiry is the extent to which restraints on campaign contributions interfere with freedom of people to associate, the labor union is a much clearer case of genuine association.[89]

The Supreme Court has twice had before it the validity of this statute as applied to union activities, and has both times avoided passing on constitutional issues, concededly because of their apparent difficulty. In *United States v. Congress of Industrial Organizations*,[90] four justices, and in *United States v. United Auto Work-*

87 18 U.S.C. § 610 (1970).

88 Except for a few cooperatives, organized in accordance with the Rochdale principles, which provide for equal votes by all members.

89 The Supreme Court has expressly held that at least some labor union activities are protected by freedom of association. *See, e.g.*, Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); UMW v. Illinois Bar Ass'n, 389 U.S. 217 (1967). Comparable activities by non-business corporations for the purpose of pursuing political goals are probably similarly protected, NAACP v. Button, 371 U.S. 415 (1963), but it is doubtful whether business corporations would be treated similarly. *Cf.* note 85 *supra*.

90 United States v. CIO, 335 U.S. 106 (1948).

ers,[91] three, disagreed with the disposition of the cases and would have held the statute unconstitutional as applied. A few lower court decisions have upheld at least some applications of the statute to labor unions, but the problem has obviously proved troublesome to the Supreme Court.[92] Here again, the distinct possibility exists that a line will be drawn between types of political expenditures by unions, upholding restraints on some but not on others.[93]

Another purpose of the rule on unions may be to protect individual members from having their dues employed in support of candidates they personally oppose.[94] This might serve as a further argument in support of the validity of the statute since in addition to the interest in freeing elections from one form of asserted undue influence, it tends to safeguard possible constitutional rights of dissenters.

The issue of dissenting members' rights in connection with union political activity reached the Supreme Court in another context in *International Ass'n of Machinists v. Street*.[95] Dissenting members claimed that if the amendment to the Railway Labor Act permitting the union shop also allowed dues to be used for political purposes, their first amendment rights would be im-

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91 United States v. UAW, 352 U.S. 567 (1957).

92 The Court will have another opportunity to face these issues in United States v. Pipefitters Local 562, 434 F.2d 1116 (8th Cir. 1970), *cert. granted*, 402 U.S. 994 (1971). It may be noted, however, that three of the seven judges of the Eighth Circuit, sitting en banc, would have avoided the constitutional questions in the case (434 F.2d 1130 *et seq.*), and the Supreme Court may well follow their lead.

93 Section 205 of the Federal Election Campaign Act of 1971, *amending* 18 U.S.C. § 608 (1970) also attempts to draw a line with respect to labor union activities, in order to reduce the likelihood of constitutional difficulties; "contribution or expenditure" now excludes "communications . . . by a labor organization to its members and their families on any subject" as well as "nonpartisan registration and get-out-the-vote campaigns . . . aimed at its members and their families," and "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a . . . labor organization." Comparable corporate activities are accorded similar protection.

94 Similar arguments might be made with respect to dissenting corporate stockholders. The issue would seem to depend on whether the expenditure of corporate funds was or was not within the powers of the corporation. *Cf.* note 78 *supra*. Compare also United States v. First Nat'l Bank of Cincinnati, 329 F. Supp. 1251, 1252-53 (S.D. Ohio 1971) (dictum upholding difference in treatment between corporations and partnerships because of both less likelihood of problems of minority protection and smaller probable impact on result).

95 367 U.S. 740 (1961).

paired. Once more the Court avoided the constitutional issue by construing the statute to permit dissenters to refuse to pay (or to obtain refunds of) that portion of the dues which could be attributed to the political activity. It is interesting that the Court felt that congressional approval of agreements allowing union funds to be used for political purposes against the wishes of dissenters raised constitutional difficulties sufficiently serious as to justify adoption of a strained construction of the statute in order to avoid them; yet in the *CIO* and *UAW* cases the Court found constitutional difficulties in the converse cases of congressional prohibition of expenditures by unions for political activity.[96]

The area is certainly not free from doubt. The Supreme Court has had opportunities to shed some light in this area, but has given us very little.[97]

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96 Justice Black, who had dissented in both the *CIO* and *UAW* cases, also dissented in *Street*, on the ground that the first amendment rights of the protesting members of the union had been infringed.

Perhaps the Court could have avoided the issue in *Street*, by refusing "to test union action by constitutional standards," since such standards normally apply only to governmental action. Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49, 72. But the statutory approval of the union shop agreement did involve some degree of governmental action. For example, an earlier version of the same statute permitting representation by exclusive bargaining agents was construed to forbid racial discrimination by such a union, thus avoiding what was felt to be a constitutional problem. Steele v. Louisville & N.R.R., 323 U.S. 192, 198 (1944).

Here again, the Federal Election Campaign Act of 1971 § 205 attempts to meet the problem by forbidding contributions or expenditures financed by "dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment."

97 There are also a number of decisions of the lower federal courts bearing upon the constitutionality of restraints on corporate and union contributions to election campaigns. *See, e.g.*, United States v. United States Brewers' Ass'n, 239 F. 163 (W.D. Pa. 1916); United States v. Painters Local No. 481, 172 F.2d 854 (2d Cir. 1949), *rev'g* 79 F. Supp. 516 (D. Conn. 1948); United States v. Construction and General Laborers Union, 101 F. Supp. 869 (W.D. Mo. 1951).

The restraints on civil service employees upheld in United Public Workers of America v. Mitchell, 330 U.S. 75 (1947), did not apply directly to the making of contributions as such, but in fact upheld restrictions on seemingly more fundamental first amendment rights such as oral or written public statements of support of a party or a candidate. *Cf.* the companion case of Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127 (1947), in which the activity held properly forbidden consisted in large part of presiding over a political fund-raising dinner.

If the interest in protecting the civil service from political contamination is sufficiently strong to permit the restraints upheld in the *UPW* case, it would seem, *a fortiori*, sufficient to sustain an outright prohibition of contributions by government employees.

II. Limits on Expenditures

A. *General Limitations*

The constitutional questions raised by proposals to limit the amount of money a candidate may spend on a campaign are closely analogous to those already discussed in connection with limitations on the size of contributions. Essentially the same sources of federal authority apply to both. The power to regulate the manner of congressional elections seems equally relevant to both proposals. Interstate commerce is affected in the same way by the expenditures of a candidate as by the contributions that pay for those expenditures. Power to implement the fourteenth amendment, if a sufficient link to state action can be found to support regulation of campaign financing, might be based on a slightly different rationale: affording a measure of equal protection to candidates, instead of to voters, by reducing the differences in financial ability of competing candidates to get their messages across. Alternatively, if the maximum amount of money allowed to be spent could reasonably be expected to be obtained from small and medium-sized contributions alone, the spending limit might be regarded as an indirect way to discourage large contributions.

Limitations on expenditures of presidential candidates might not be supported on the basis of *Ex parte Yarbrough* and *Bur-*

Meanwhile, a doctrine may be evolving which could make constitutionally required some restraints on political activity among public employees. Shakman v. Democratic Organization, 435 F.2d 267 (7th Cir. 1970), held that a candidate for a seat in a state constitutional convention was denied equal protection where public employees appointed for short renewable terms were coerced into supporting his machine-endorsed opponents. Observations on the case suggest that political patronage systems as a whole may ultimately be held unconstitutional, as inherently unfair to independent candidates for nomination or election. Recent Case, 84 Harv. L. Rev. 1547, 1556-57 (1971).

Another special type of restraint sometimes suggested is upon contributions by residents of one state to the campaigns of candidates in another. The evil sought to be avoided might be the exertion of undue influence upon, for example, members of congressional committees with jurisdiction over matters financially important to the contributor. There are so many other, and legitimate reasons, for such contributions, however, that such a limitation would be hard to uphold. A somewhat parallel restraint in a Wisconsin statute (forbidding anyone not a candidate or a committeeman from spending money for political purposes in a county not his own) was held unconstitutional, as a denial of free speech, in State v. Pierce, 163 Wis. 615, 158 N.W. 696 (1916).

roughs v. United States[98] quite so readily as can limitations on contributions to their campaigns. The danger of undue influence on the part of large contributors involves issues different from those raised by the disproportionately greater opportunity of one candidate to reach the public. Nevertheless, dictum in *Yarbrough* might apply as readily to candidates' expenditures as it does to magnates' contributions:

> If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, *the free use of money in elections,* arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety.[99]

It may also be possible to find authority in *Burroughs.* The Court held that Congress had "power to pass appropriate legislation to safeguard [a presidential] election from the improper use of money to influence the result."[100] "Improper" may suggest bad motivation—*i.e.,* the hope of obtaining reward in appointments or policy decisions. But "to influence the result" seems to apply at least as directly to a candidate's expenditures as it does to a supporter's contributions. Of course, we cannot parse a Court opinion as we would a statute, but this part of the Court's reasoning in *Burroughs* does not seem completely inapposite.

The statement in *Burroughs*[101] setting forth in extremely broad terms the freedom of Congress to select whatever means it prefers to protect the election of the President from corruption lends support to expenditure limitations. Here again Congress could determine that huge campaign budgets inevitably induce some huge contributions, and that limitation of the former could restrain the latter. Even taking "corruption" more literally it is possible to argue that the availability of too much money to spend might persuade overzealous campaign workers to engage in bribery of voters or officials responsible for counting the votes. At least Congress might so conclude, and, as stated in *Burroughs,* "the degree of their [the means adopted] necessity, the extent to

98 See text at notes 25 to 31 *supra.*
99 110 U.S. at 667 (emphasis added).
100 290 U.S. at 545.
101 *Id.* at 547-48.

which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone."[102]

Thus, there seems to be substantial basis for presumptive authority to limit expenditures of presidential and congressional candidates. There remain, however, the questions of the constitutional limitations upon it. Again, the considerations involved are analogous to those discussed above in connection with limits on contributions, but again there may also be some differences. Limits on expenditures restrict the first amendment rights of the candidate to persuade voters to support him, as compared with the restrictions on a contributor's right to do so when the size of his contribution is limited. In both situations, there may be thought to be adverse indirect effects on the rights of voters to associate in political parties.[103] Protection of government officials from undue influence is less directly achieved by limits on candidates' expenditures, but there may be more direct protection from possible bribery by unscrupulous campaign workers. Reduction of inequalities in the relative impact of voters on the final result has its counterpart in reduction in inequalities in the opportunities of the candidates to communicate with and try to persuade the voters. Additionally, the interest of the qualified candidate lacking personal wealth or affluent supporters in having a reasonable chance to be nominated and elected is also protected.[104]

Finally, validity may turn in part on the size of the limitation. A figure so low as to deny the candidate as reasonable opportunity to get his message across to the voters would be hard to defend. Such a figure might also give undue advantage to incumbents who tend to be better known to the electorate and also to have access to a wide range of ways of communicating with the public without formally campaigning.[105] On the other hand, with no

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102 *Id.* at 548.

103 *Cf.* Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

104 The Supreme Court has recently held invalid a state law requiring the payment of high filing fees by candidates seeking to enter primaries, as violative of the equal protection clause. Bullock v. Carter, 92 S. Ct. 849 (1972).

105 This point was made by President Nixon in his veto message rejecting the bill proposed by Congress in 1970. 116 Cong. Rec. 17801 (daily ed. Oct. 12, 1970). *See generally*, Note *Campaign Spending Regulation: Failure of the First Step*, 8 HARV. J. LEGIS. 640 (1971).

limit or one too high, there may be a real danger that a heavily financed candidate can so overload the channels of communication as to render his opponent's right to speak virtually worthless.

Thus far the considerations for and against constitutionality have been substantially similar to those suggested above in connection with limitations on individual contributions. Some specific problems connected with limitations on expenditures deserve special attention. Pre-1971 laws pertaining to candidates' expenditures seemed clearly unsatisfactory. There were no limits directly applicable to presidential campaigns. On the other hand, the limits imposed on congressional candidates were laughably low and never enforced. Lack of effective regulation of the expenditures on behalf of a candidate by committees supporting him afforded an escape from the unrealistically low limits on the candidates' expenditures but as a practical matter removed all limits whatever. Furthermore, most of the statutes did not apply to primaries. An attempt has been made to deal with all of these problems in section 104 of the Federal Election Campaign Act of 1971.

The problem of committees remains particularly difficult. If the expenses of the candidate's campaign are paid for by committees or other groups or individuals supporting him, rather than by him directly, and such expenditures are not applied against the total permitted to the candidate, all expenditure limitations may well prove worthless. The candidate's managers will see to it that most contributions are solicited by and filtered through committees, rather than going directly to the candidate; campaign expenses will correspondingly be paid by the committee rather than by the candidate. This is precisely what has happened until this year. A large fraction of members of Congress were able to report truthfully that *they* had not spent a nickel on their campaigns for reelection.

Effective regulation of what each committee may spend in support of a candidate still leaves the possibility of large numbers of separate committees all soliciting funds and spending money in his behalf. Thus the only way to make campaign expenditure control meaningful is to apply the expenditures made by committees against the total expenditures allotted to a candidate.

This procedure would solve one problem, but it raises others. The candidate might find himself seriously disadvantaged if the expenditures of all such committees were charged against his total. While some committees might be completely responsive to the wishes or instructions of the candidate or his manager about how to support his campaign, others might have minds of their own. Suppose a committee spent large sums in support of a candidate, adopting as their slogan, "We admit he's pretty terrible, but he's the best of a bad lot." Or suppose the committee were headed by notorious Communists, racketeers, professors, or other unpopular groups? Even if the candidate did not regard the committee as counter-productive, suppose he felt that its campaigning techniques were ineffective or inefficient, and that the statutorily limited amount of money that could be spent on his campaign should be channeled more effectively?

The choices are not easy. Must the candidate let the committee go on spending money to be charged against his ceiling? May he be empowered to forbid the committee to make further expenditures?

The constitutionality of the latter choice would be difficult to sustain.[106] In effect, the candidate would be authorized by law to stop the committee from spending[107] money in support of his campaign, although such spending typically takes the form of placement of newspaper advertisements, payment for radio and television programs, hiring of halls for meetings and speeches, and similar activities all clearly within the ambit of the first amendment. The fact that the candidate, rather than government, prohibited these forms of speech and association would not appear to save the proposal. Certainly Congress cannot validly silence people by delegating to private citizens the power

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106 *Cf.* Cantwell v. Connecticut, 310 U.S. 296, 303-07 (1940), in which the Court struck down the granting of discretion to forbid even solicitation of funds for a constitutionally protected purpose (in that instance, religion).

107 It might be easier to uphold prohibitions on committees (or others) collecting money on behalf of a candidate than *spending* it in order to persuade voters to support him; the restraint on speech would seem to be one step further removed.

Another distinction might be drawn between organizations already in existence for broad spectrum purposes (such as labor unions or professional or trade associations) and those created solely for political purposes; control over the spending of the latter would seem more readily sustainable.

to do so. And while this situation may be unique in that it permits a person to restrain speech in his favor, rather than that opposing him, the interest in having every view expressed and heard is extremely strong.[108]

Statutory programs giving the candidate a veto power over expenditures by anyone in behalf of his campaign might take the form of requiring all payments to be channeled through a single person. In Britain there are such controls in Parliamentary elections, although only at the level of the individual constituency, and only for the rather short period technically deemed to be the campaign. "Either the candidate or his 'election agent' must personally receive all money, and authorize all expenses."[109] Britain, of course, has no first amendment, but Florida has a somewhat similar law which has been upheld by the State Supreme Court,[110] and reportedly works very well.[111]

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108 *See* Note, *Statutory Regulation of Political Campaign Funds*, 66 HARV. L. REV. 1259, 1267-68 (1953); Penniman, *Financing Campaigns in the Public Interest*, in CAMPAIGN FINANCES 1, 36 (American Enterprise Institute for Public Policy Research, 1971); Winter, *Money, Politics and the First Amendment*, *id.* 45, 65; Comment, *Free Speech Implications of Campaign Expenditure Ceilings*, 7 HARV. CIV. RIGHTS — CIV. LIB. L. REV. 214 (1972). *Contra*, Mitau, *Selected Aspects of Centralized and Decentralized Control over Campaign Finance*, 23 U. CHI. L. REV. 620, 633-35 (1956).

109 *See* Newman, *Money and Elections Law in Britain — Guide for America?*, 10 WEST. POL. Q. 582, 583 (1957).

110 At the time of the state supreme court decision the Florida statute, FLA. STAT. ANN. § 99.161(4)(a) (1960), required, among other things, that all campaign contributions, expenditures, and obligations therefor, including those of the candidate and his family, go through the candidate's campaign treasurer or deputy treasurers. The statute had elaborate provisions for disclosure and publicity, but it did not prescribe any limits on campaign expenditures. The statute was upheld when a citizen and a radio station owner challenged its interference with the right of the citizen to pay to broadcast his views in support of a candidate without the consent of the candidate's campaign treasurer. Smith v. Ervin, 64 So. 2d 166 (Fla. 1953).

The overriding of rights of free speech was upheld by the Florida Supreme Court in part on the basis of the interest in bolstering the reporting and disclosure features of the statute. "Otherwise, how could the elector ever tell who was behind this candidate or that: and the Legislature chose the only way by which the contributions to campaigns could be policed and become the knowledge of any man who would take the trouble to go to the state agency where the reports are assembled." *Id.* at 170. In fact, there would seem to be a number of possible answers to the court's rhetorical question; for example, the adherent who paid for the broadcast could be required to report that fact, and if the candidate wanted to repudiate that support, he could do so publicly.

Where the channeling of all expenditures through the candidate or his delegate, or other device to permit the candidate to prevent an unwanted expenditure in his support, is intended instead to plug a loophole in the restraints on the candi-

Techniques have been suggested from time to time to retain some limit on the candidate's expenditures without authorizing restraints on the communications of his supporters. For example, the expenditures of a committee might be charged against the candidate's maximum unless he took affirmative steps to disavow its support.[112] As a practical matter, if contemplated total expenditures appeared to be approaching the ceiling, formal disavowal by the candidate would probably become a hollow ritual and have no substantial impact upon the effectiveness of the committee's efforts in support of his candidacy. Thus far, no proposal has been encountered that would provide really effective limits on campaign expenditures without giving rise to the most serious doubts as to the constitutionality of the restraints placed upon supporters.

While an attempt was made by Congress to avoid these difficulties in the Federal Election Campaign Act of 1971, serious problems remain. Section 104(a)(6) states: "Amounts spent for the use of communications media on behalf of any . . . candidate . . . shall . . . be deemed to have been spent by such candidate." The Conference Committee Report[113] makes clear that this is intended to apply "whether made by a candidate, a political committee, an individual, or otherwise, and whether

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date's total expenditures, the counterpart of the Florida court's argument would seem to merit greater weight. How, indeed, can such controls be more than an idle gesture if a substantial part of the campaign contributions go to, and expenditures in his support are made by, a scattering of committees? If *Smith v. Ervin* is good law, candidate control of committee expenditures as part of a program to limit campaign spending would seem to be valid *a fortiori*.

The Florida statute was amended in 1970 to impose expenditure ceilings on amounts which may be spent in campaigns for public office. FLA. STAT. ANN. § 99.161(6) (Supp. 1971).

The Florida statute now excepts certain donations by the candidate from the contribution limits previously established. FLA. STAT. ANN. § 99.161(2)(a) (Supp. 1971). The term "contribution" and certain exceptions for bona fide gifts by relatives of state office holders were further developed by the Florida legislature in 1971. [1971] Fla. Laws ch. 71-159, *amending* FLA. STAT. § 111.011 (1969).

111 See Roady, *Ten Years of Florida's "Who Gave It — Who Got It" Law*, 27 LAW & CONTEMP. PROB. 434 (1962). The greatest accomplishment of the law appears to be the establishment of a truly effective system of disclosure of contributions and expenditures, coupled with sufficient and timely publicity to keep the voters informed. As noted previously the Florida law has been amended substantially since the Roady article was written. See note 110 *supra*.

112 *See, e.g.*, Mitau, *supra* note 108, at 633.

113 H.R. REP. No. 752, 92d Cong., 1st Sess. (1971).

or not the person making the expenditure is authorized by the candidate to do so." While candidates are not expressly empowered to forbid undesired spending by their supporters. Section 104(b) and (c) prohibit charging for the use of media on behalf of a candidate unless he or his agent certifies in writing that the payment of the charge will not violate the statutory limit. The mere power of the candidate to refuse to give such certification would block the attempt of the supporter to communicate his views, unless the media were willing to waive their charges. Here again, a significant factor might be whether other techniques are available for achieving at least some of the same purposes without comparable curtailment of constitutionally protected rights.

There are additional difficulties arising out of the part played by campaign committees. Often committees support candidates for several offices; if their expenditures were to be attributed to the ceilings of those whom they supported, problems of allocation would be difficult. This would be particularly true of "party" committees, which lend support to the entire slate of candidates, federal, state, and local, running at the same time.

Where a candidate is identified in the public mind with one side of a controversial question, expressions of views of an "issue" committee supporting the same position, or opposing the position taken by the candidate's opponent, may be as effective in influencing voters as an express endorsement. Suppose the committee goes further, and asserts its position and couples it with a statement as to the record of the candidate on the same issue? When does advocacy of a principle end and support of a candidate begin? Suppose a large number of candidates are identified in the public mind with one side or the other of a national issue —such as the Vietnam War, gun control, the SST, or the ABM? At what point, and to what extent, can expenditures of a committee taking a strong position on that issue be charged against the limits of any candidate?

Where a statute has criminal sanctions, vagueness alone might be sufficient for invalidation. Even if the only remedy were by way of injunction, uncertainty in an area of freedom of communication and association with the possibility of a resulting "chilling effect"

on activity in fact not prohibited, might give rise to serious constitutional doubts. The Comptroller General has recently issued carefully drafted regulations,[114] pursuant to section 105 of the Federal Election Campaign Act of 1971, seeking to resolve as many of these uncertainties as possible. To the extent that he has succeeded, constitutional difficulties may be avoided.

Another type of sanction for excessive expenditures that has at times been suggested — denial of office — gives rise to a separate array of constitutional problems. A statute so providing with respect to congressional elections would probably run afoul of the provisions of article 1, section 5, clause 1, of the Constitution, which states: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." While the authority of a house to determine "Qualifications" has itself been qualified by *Powell v. McCormack*,[115] the exclusive right of each House to determine who had been elected to it would probably not be subject to limitation by statute.[116]

On the other hand, perhaps pursuant to the same constitutional provision, each house could adopt its own resolution, setting forth the maximum amount of campaign expenditures it would tolerate, and apply it in judging the election of future members. However, it is doubtful that it could bind itself in advance with respect to a future decision. Admission of a member who had violated the expenditure ceiling set forth in the resolution could probably not be questioned elsewhere; moreover, it could be accomplished in two steps instead of one by first repealing or amending the resolution.

If a house were to adopt a resolution limiting expenditures in such fashion as to violate a candidate's first amendment rights, and then apply the resolution to deny a seat to one who had exceeded

114 11 C.F.R. §§ 4.4, 4.5, 4.6, 37 Fed. Reg. 6158 (Mar. 24, 1972). There are additional problems in connection with committees. Where, as in the Federal Election Campaign Act of 1971, § 301(a), primaries are included in the coverage of the statute, and candidate approval of committee expenditures is, in effect, required, it may be much more difficult to "draft" hesitant candidates. Also, limits on committee activity might shift intra-party balances of power, perhaps in favor of committees favored by the candidate over smaller, more local units. *Cf.* A. HEARD, THE COSTS OF DEMOCRACY 451 (1960); Case Note, 78 HARV. L. REV. 1260, 1262 (1965).

115 395 U.S. 486 (1969).

116 Other constitutional limitations might, however, be applicable. *See* Bond v. Floyd, 385 U.S. 116 (1966).

the limits on spending so imposed, it might be possible to challenge the action successfully in court, although there are no cases directly in point. It is also uncertain whether the action of a house, if it chose first to seat a member and later to expel him by a two-thirds vote[117] when convinced that he had violated the resolution, could be subject to similar challenge.

With regard to the presidency, it is not clear whether a prior statute could bind the electoral vote-counting process later conducted by a joint session of both houses pursuant to the twelfth amendment.[118]

B. *Specific Limitations*

Proposals to limit campaign expenditures often take the form of ceilings upon expenditures for certain purposes, either as the sole limitation[119] or as a part of a larger limit upon total expenditures.[120] In addition to the constitutional questions applicable to overall limits, restrictions on the size of specific categories of expenditures may give rise to problems of their own.

1. Broadcasting

Even if there were serious doubts as to presumptive federal authority to restrict campaign expenditures generally, there should be no difficulty with respect to limits on radio and television in view of federal power under the commerce clause. The real difficulties arise in connection with the constitutional restraints that may be applicable.

While limits on the total expenditures of candidates may impinge to a degree upon rights of both the candidate and his potential listeners, limits on money spent on radio and television may arguably deny some constitutional rights of the broadcasters. This contention probably has little merit. The Supreme Court has recently declared in *Red Lion Broadcasting Co. v. FCC*: "It is the

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117 Pursuant to U.S. CONST. art. 1, § 5, cl. 2.

118 *Cf.* Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1, 31-37 (1968).

119 As in S. 3637, 91st Cong., 2d Sess., the bill vetoed by President Nixon last year.

120 As in § 104(a) of Federal Election Campaign Act of 1971.

right of the viewers and listeners, not the right of the broadcasters, which is paramount."[121] And it is certainly too late in the day for the broadcasters to argue that limitations on their sales of time to candidates, by denying them part of their potential market, deprive them of property without due process of law.

The attractive feature of regulation of spending for radio and television[122] is that it is more easily managed and readily policed than regulation of other types of expenditure. Also, the danger of one candidate overwhelming and effectively blotting out the messages of his opponents through massive spending for broadcasting may be particularly serious. The public apparently gives a very large fraction of its time and attention to television viewing. The number of available channels is limited. If one candidate dominates that medium[123] the effect on the voters may be significantly different from that of disproportionate spending on other means of communication, such as newspaper advertisements, mailings, billboards, or bumper stickers.

On the other hand, limitations on money spent for broadcasting may constitute a special form of interference with freedom of speech of candidates by forcing one whose appeal would be most effective when conveyed through that medium to reshape his campaign in directions in which he may be less successful. Of course, external factors — in particular, the tremendous recent growth of television both generally and as a vehicle for campaign persuasion — have already caused considerable reshaping of campaign techniques. In the light of the federal government's special authority and responsibilities in the area of broadcasting, it may not be obligated, or even permitted, to adhere to a strictly "hands off" policy.

Campaign broadcasting has almost from its inception been regulated. Section 315 of the Communications Act[124] requires a broadcaster who permits any legally qualified candidate for public

121 395 U.S. 367, 390 (1969).

122 And, as in the Federal Election Campaign Act of 1971, § 102(2), 104(c), CATV as well.

123 While the "equal time" provision of the Communications Act, 47 U.S.C. § 315 (1970), requires the broadcaster who sells time to one candidate for a personal appearance to offer equivalent time at equal rates to his opponents, it does not help the opponent who lacks the funds to pay for it.

124 47 U.S.C. § 315 (1970).

office to use his station to give equal opportunities to all other such candidates for that office. Hence, if he gives one candidate free time, he must give all candidates the same amount of free time, at equally attractive hours. If he charges, he must offer equivalent time at the same price to every other candidate. With inherent limitations on the number of television and radio channels, some sort of control on the discretion of licensees, particularly with regard to their potential ability to discriminate among political candidates, is essential. The need for some such protection was recognized by the then Secretary of Commerce Herbert Hoover as early as 1924.[125] Its constitutionality is "unquestioned."[126]

To a degree, section 315 sacrifices freedom in favor of equality. Where there are few candidates in an election the provision works well.[127] The voters are interested in seeing and hearing the major candidates. Stations and networks have indicated their intention to broadcast, free of charge, debates between leading candidates for the presidency. When, however, there are one or more minor candidates they must be given an opportunity to participate as well. Subject to such requirements, the debates lose much of their interest for the public, the principal candidates become unwilling to participate, and the broadcasters refuse to offer them at their own expense.

Section 315 was suspended for the 1960 presidential campaign. There have since been a number of suggestions ranging from suspension of the statute in presidential elections to its outright repeal. It seems appropriate to ask whether if section 315 did not exist the Supreme Court would have had to invent it. To put it another way — would it be constitutional to suspend or repeal it?[128]

Free time to major party candidates clearly discriminates against all others. Regarding obstacles preventing a third party getting

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125 *See* Barrow, *The Equal Opportunities and Fairness Doctrines in Broadcasting: Pillars in the Forum of Democracy*, 37 U. CIN. L. REV. 447, 449 (1968).

126 395 U.S. at 391.

127 Primaries may give rise to some added complexities.

128 The suspension in the 1960 Presidential race was not challenged in court. The Senate has recently passed S. 3178, which would repeal the equal time provisions for presidential, but not other elections. 118 Cong. Rec. S. 4752 (daily ed. Mar. 23, 1972).

on the ballot, the Supreme Court has said that the two-party system is not protected by the Constitution.[129]

If section 315 were repealed and minor candidates discriminated against, the discrimination would be at the hands of the broadcasters, rather than the federal government. The pertinent provisions of the Constitution apply to government action — state or federal — not to the actions of private persons. Can it nevertheless be maintained that there is a sufficient nexus between the role of the government in this context and the discrimination imposed by the broadcasters to warrant treating the latter as government action?

Several arguments can be made in support of an affirmative answer. If the purpose of Congress in repealing section 315 would be to open the door to discrimination against minor candidates — and realistically that might well be deemed part of its purpose, however laudable its overall goal — the act of repealing section 315 might be regarded as intended to facilitate private discrimination and perhaps come under the ban of *Reitman v. Mulkey*.[130] If control of the air waves be deemed a function that could have been assumed in its entirety by the government, can it wash its hands of its obligation to perform that function without discrimintion through delegating it to private parties?[131] Alternatively, the preemptive assumption by Congress of almost complete regulatory control over broadcasting may well impose an obligation to include provisions against discrimination in its regulations.[132]

Assuming that the government is deemed responsible, and that constitutional standards apply, questions of balancing of interests remain. Repeal would open the door to meaningful debates between the major candidates, and information of genuine importance might be made much more readily available to the

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129 Williams v. Rhodes, 393 U.S. 23, 31-32 (1968).

130 387 U.S. 369 (1967).

131 *Cf.* Marsh v. Alabama, 326 U.S. 501 (1946).

132 *Cf.* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952); Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959, 964 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964). *See also* Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *noted in* 85 HARV. L. REV. 689 (1972), holding that there is a first amendment right to access to broadcast media. *But cf.* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972).

voters. If the candidates were not charged for the time,[133] their dependence upon private contributions would be reduced, also a healthy development. These advantages would, of course, have to be weighed against the unfairness to the lesser candidates.

Repeal or suspension, without retention of some safeguards, would not guarantee the contemplated advantage and might permit additional unfairness. Theoretically, it would permit a station to discriminate between the principal candidates, giving free time to one the broadcasters favored and charging his opponent. Such practices, even if not barred by statute, would undoubtedly run afoul of the "fairness doctrine" of the Federal Communications Commission.[134]

Modifications of section 315 have also been suggested. Formulae have been proposed for allocations of smaller amounts of time to lesser candidates.[135] Generally, such proposals involve the same problems, but with the arguments against validity somewhat weakened. There are also problems of classification and definition; the election in the past two years of third-party candidates for Mayor of New York City and United States Senators from Virginia and New York suggests that reliance upon the showing of a party in a previous election may be deceptive.[136] But it does not follow that no system of classification of candidates could be valid.[137] It should be noted that *Williams v. Rhodes*[138] did not

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133 Some proposals for free radio and television time for candidates would require broadcasters to make the time available without compensation; others would have the government pay, at either regular or reduced rates. The constitutional problems in the two situations are not neccessarily identical. Government payment should be deemed a form of campaign subsidy.

134. *See* Barrow, *supra* note 125; Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change*, 37 U. CIN. L. REV. 550 (1968); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1964).

135 *See, e.g.*, the suggested scheme for classifying parties into three categories on the basis of votes received in prior elections. TWENTIETH CENTURY FUND COMMISSION ON CAMPAIGN COSTS IN THE ELECTRONIC ERA, VOTER'S TIME 19-27 (1969).

136 Section 315 itself, with its limitation to "legally qualified candidates," might be construed to exclude those not on the ballot but depending upon write-in votes. Even if a broader construction is adopted, appearance on the ballot might be a viable dividing line for constitutional purposes between those entitled and not entitled to equal time. But with the states forbidden to impose difficult barriers upon minor parties (Williams v. Rhodes, 393 U.S. 23 (1968)), the potential problem of large numbers of qualified candidates will remain.

137 A test based on numbers of signatures on petitions would, however, involve difficult problems of verification and might be subject to abuse by overly enthusiastic

purport to forbid *every* restriction upon the right of a new party to a place on the ballot; it merely held that the restrictions challenged in that case were unreasonably difficult to surmount.[139] Requirements deemed by the Court to be reasonable have since been upheld.[140] From the standpoint of listeners or viewers, the statements of the serious contenders *are* of more interest, more newsworthy, and more likely to be relevant to the way in which they are likely to vote. It may not be unreasonable for Congress to take such factors into consideration.[141]

Some proposals would restrict electronic campaigning in more limited ways. One suggestion has been to forbid the use of "spot broadcasts" — defined, for example, as those of less than five minutes, or one minute. The justification appears to be that such broadcasts tend to convey oversimplified statements of the issues, or hit-and-run personal attacks on opponents. There are, however, obvious constitutional problems in a measure which would take away from the candidate what is often an entirely legitimate means of communicating.[142] It would allow the government to mold somewhat the shape of the campaign. That part of the audience which has little patience for lengthy discussion may find such short programs their best source of information about the positions of the candidates.

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supporters of a candidate or party. The experience of unrestricted "balloting" of the National League All-Star team in 1957 may be illustrative. A late avalanche of votes from Cincinnati resulted in the "election" of players from that city's team to all eight positions to which the count applied. *See* N.Y. Times, June 29, 1957, at 12, col. 6.

138 393 U.S. 23 (1968).

139 *Id.* at 33 & n.9.

140 Jenness v. Fortson, 403 U.S. 431 (1971).

141 A related question may be whether the "fairness doctrine" in at least some of its applications may be constitutionally compelled, rather than merely permitted. If there is a constitutional basis for allowing candidates equal time for personal appearances on radio and television, there may be similar requirements for allowing their supporters equal time. But the "fairness doctrine" has a number of disparate applications and there are too many borderline situations to permit a general answer. It may also be noted that § 103(a) of the Federal Election Campaign Act of 1971 adds to the grounds for possible revocation of broadcast licenses under § 312 of the Communications Act, "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a [candidate for federal office]."

142 *Cf.* Mills v. Alabama, 384 U.S. 214 (1966).

2. Newspapers, Magazines and Other Traditional Media

Unlike broadcasting, newspapers, magazines, and other traditional media are not subject to government control as such — in fact, there is a strong constitutional tradition against interference. Government authority to limit expenditures through these channels would have to rest upon the same bases discussed above for control of candidates' expenditures generally.

In balancing values there are further distinctions. As suggested above, there is a possible argument that equal treatment of candidates by broadcasters is constitutionally required, and in any event, legislation commanding it is constitutionally permitted. There is no analogous basis for comparable congressional controls over newspapers or other printed matter. The difference does not rest solely on the scarcity of broadcasting channels and possible domination by the advocates of one candidate. The distinction may lie in the fact that the broadcasting channels are *inherently* finite in number,[143] and the granting of licenses has to be regulated to prevent chaos.

The government clearly may not assert licensing power over newspapers.[144] But lack of power to license does not necessarily preclude all authority to regulate. Perhaps legislation designed to ensure some measure of access to newspaper space — possibly analogous to the fairness doctrine applied to broadcasters — would

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143 *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). It may be contended, however, that the number of channels is not necessarily limited, or at least that with respect to CATV the limits are only economic rather than physical. The Court sought to meet this argument in *Red Lion*, as follows:

> Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunties for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government.

Id. at 400.

144 Near v. Minnesota, 283 U.S. 697 (1931); *cf.* New York Times Co. v. United States, 403 U.S. 713 (1971); Grosjean v. American Press Co., 297 U.S. 233 (1936).

be upheld.[145] The Conference Committee dropped a House of Representatives amendment to the Federal Election Campaign Act of 1971 that would have required any newspaper or magazine that made space available to a candidate to make equivalent space available on the same basis to his opponents.

A further distinction between broadcasting — particularly television — and other media may be found in the increasingly dominant role the former is playing in election campaigns, with expenditures for it "by far the largest functional political expense" of the 1968 presidential campaign.[146] The values served by its regulation may well be proportionate to the dimensions of the activity.

3. Discrimination Among Types of Media

Questions may be raised as to the validity of limiting expenditures in some areas of communication but not in others. The candidate might complain that he will be forced to campaign in a fashion uncomfortable to him. Furthermore, the media falling within the regulated group may contend that they are being denied the equal protection of the laws to the extent guaranteed by the fifth amendment.[147]

If the arguments of media claiming they are being discriminated against are based on purely economic grounds, any reasonable classification by the legislature will survive such attack.[148] If the argument is couched in terms of favoritism by the legislature of one type media over another in partial competition with it, a different standard may be applicable. Where the Court has felt that "fundamental rights" are involved, it has shown much less tolerance even for reasonable classifications.[149]

Despite possible substance, this argument would probably fail in the absence of a showing of either an intention by Congress to

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145 *Cf.* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

146 H. ALEXANDER, FINANCING THE 1968 ELECTION 94 (1971).

147 *Cf.* Bolling v. Sharpe, 347 U.S. 497 (1954), and note 68, *supra*.

148 *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949).

149 *Cf.* Skinner v. Oklahoma, 316 U.S. 535 (1942) (fertility); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate movement); and especially Williams v. Rhodes, 393 U.S. 23 (1968) (voting, and presumably first amendment rights in general).

assist one type of medium over another through exempting expenditures from the limitation, or a substantial impairment of the competitive position of those falling within the limitation. In the absence of invidious types of discrimination, the legislature may normally "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind"[150] and need not "strike at all evils at the same time."[151]

III. Reporting Requirements

For many years there have been federal laws requiring the reporting of contributions to candidates for federal office, but these have been quite spotty in their application. Title III of the Federal Election Campaign Act of 1971, however, now imposes a broad array of regulations of this type, requiring, among other things, frequent reports by contributors, committees, and candidates.

Reporting requirements — unlike most other forms of campaign finance regulation — have given rise to a decision of the Supreme Court squarely in point in *Burroughs v. United States.*[152] This form of regulation of campaign financing has been justified as preventing corruption and undue influence. Presumably, if the required reports were comprehensive in scope and fully publicized, several substantial benefits might be expected to follow. Contributions motivated by the expectation of exerting undue influence upon the candidate after his election might be discouraged by the publicity. Conversely, decisions and appointments by an officeholder favoring the interests of known large contributors might be inhibited. If disclosure and publicity were prompt, the voter would have some additional knowledge about the candidates and their respective supporters that would be helpful to him in deciding for whom to vote.

In addition to *Burroughs,* a helpful analogy may be found in *United States v. Harriss.*[153] There the Supreme Court upheld the

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150 Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

151 Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 610 (1935); Katzenbach v. Morgan, 384 U.S. 641, 656-58 (1966).

152 290 U.S. 534 (1934).

153 347 U.S. 612, 625-26 (1954).

validity of the Federal Lobbying Act[154] on the ground that it enabled Congress more effectively to judge the arguments of those seeking to influence its votes in the light of the identity of the persons who were financing the efforts to persuade them. Although first amendment arguments were not raised in *Burroughs*, they were offered and specifically rejected in *Harriss*.[155]

A. *Problems of Privacy*

There are constitutional problems lurking in disclosure laws which were not raised in *Burroughs* or *Harriss*. Compelling a contributor to reveal his contributions publicly does not detract from his privacy — although it is unlikely that that kind of privacy is itself constitutionally protected. *Griswold v. Connecticut*[156] indicated that there were such privacy rights in one context; but it would be difficult to conceive of a situation factually more different. The right of privacy, without more, might be outweighed by other constitutional considerations.[157]

It has been contended, however, that disclosure may subject the contributor to genuine fear of reprisals, which in turn would deter his making contributions that he was within his legal rights to give.[158] Even if public officials and other "public figures" may be required by *New York Times Co. v. Sullivan*[159] and its progeny to have thick skins, campaign contributors, like voters, probably ought not to be held to the same standard.

Since *Burroughs*, there have been a number of cases invalidating various attempts by public agencies to obtain the names of members of organizations supporting unpopular views.[160] All of these cases originated in Southern communities which at the time

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154 2 U.S.C. §§ 261-70 (1970).

155 347 U.S. at 625-26. Moreover, the Court in *Harriss* cited *Burroughs* by way of analogy, stating that Congress had "acted in the same spirit and for a similar purpose in passing the Federal Corrupt Practices Act — to maintain the integrity of a basic government process." *Id.* at 625.

156 381 U.S. 479 (1965).

157 *Cf.* Time, Inc. v. Hill, 385 U.S. 374 (1967).

158 See Winter, *supra* note 108, at 63-65 (1971); Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900, 924 (1971).

159 376 U.S. 254 (1964).

160 *E.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Bates v. City of Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961).

were extremely hostile to racial integration in general and to civil rights groups in particular. The threat of retaliation against members was real and immediate. If disclosure of members' names by either the organizations or their members were required, rights of association would be at least inhibited and possibly destroyed. Even a legitimate state ground for inquiry was held insufficient in *Shelton v. Tucker*.[161]

It is easy to conjure up cases in which disclosure of campaign contributions would cause the contributor embarrassment and quite possibly direct harm. The officer or employee of a corporation whose top management was composed largely of Republicans might be hesitant to contribute to a Democrat if he knew that his superiors would find out. A lawyer contributing to any candidate might fear losing clients supporting his opponent. A union official might find his effectiveness impaired if he were known to have contributed to a candidate identified with views hostile to organized labor. Alas, even a university professor or student might fear retaliation of sorts if his contribution to the campaign of a candidate whose views on some controversial issue were contrary to those prevailing on his campus.

But in the absence of a generally threatening atmosphere present in the cases referred to above, the values enhanced by disclosure appear to outweigh their inhibitory effect.[162]

Another Supreme Court case is more troublesome. In *Talley v. California*[163] the Court invalidated a Los Angeles ordinance which prohibited the distribution of any handbill that did not have printed on it the name and address of the person who had prepared, distributed, or sponsored it. The handbill in question urged a boycott of businesses allegedly not offering equal employment opportunities to Negroes, Mexicans, and Orientals. The

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161 364 U.S. at 485. (Organizations belonged to by a teacher were concluded to be relevant to his qualifications.)

162 Several writers on the subject have so concluded. *See* Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1, 42-43 (1966); Nutting, *Freedom of Silence: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 MICH. L. REV. 181, 204-206 (1948); Note, *Statutory Regulation of Political Campaign Funds*, 66 HARV. L. REV. 1259, 1263-64 (1953) (the latter two written before the disclosure cases cited above were decided, but also before *United States v. Harriss*. *Contra*, Winter, *supra* note 158; Redish, *supra* note 158.

163 362 U.S. 60 (1960).

Court could perhaps have invalidated merely the application of the ordinance to this handbill, on the same ground of fear of reprisal that underlay the previously referred to cases involving NAACP membership in the South. The Court did cite these cases but then went on to hold the ordinance void on its face.

Parts of the majority opinion seem to indicate that the most significant factor was the unique historical role of leaflets and handbills as means for expression of minority views. In a long line of cases beginning with *Lovell v. Griffin*[164] the Court has invalidated laws that would have licensed or otherwise interfered with leaflet distribution.[165] Perhaps the opinion can be summed up as holding that the peculiar importance of preserving handbill distribution from any deterrent whatever,[166] coupled with the frequency with which handbills proclaim unpopular views that invite reprisal, automatically renders invalid any law that requires the sponsors of a handbill to identify themselves. If this is a fair reading, the case would be clearly distinguishable from one involving required disclosure of campaign contributions.

Once again, quantitative considerations come into play. Disclosure of *all* contributions would serve no useful purpose; in fact, the surest way to impair the value of disclosure requirements would be to compel the collection of data so massive as to baffle the investigator or newspaperman. If disclosure were required only for amounts sufficiently large to give rise to possibility of the evils disclosure is intended to prevent, comparatively few of the people who might fear retaliation would be obliged to report. Those wealthy enough to make large contributions would generally be immune from any fear of retaliation. On the other hand, if contributions outside the range of possible harm had to be disclosed, contributors might still feel insecure against the possibility of disclosure with little public gain to show for it. Perhaps different levels, depending on the office involved, would be appropriate. In any event, a reasonably high floor on the amount over

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164 303 U.S. 444 (1938).

165 362 U.S. at 62-65.

166 The Court expressly avoided passing on the validity of handbill laws narrowly drawn to forbid specific evils such as fraud, littering, etc. *Id.* at 64.

which contributions would have to be reported[167] would go far to overcome constitutional objections.[168]

Relevant to any balancing of values would be the probable effectiveness of the reporting program. One that buried the reports in files accessible to the press only with great difficulty would give rise to some of the evils which compulsory reporting may cause, without most of the compensating benefits to the public. One that made the reports easily available, but not in time to be publicized while the campaign was still in progress, might be helpful in averting later misconduct by officeholders, and perhaps also in discouraging contributions motivated by the hope of later favors. It would not, however, serve the additional purpose of giving the voters information concerning the identity of the candidates' supporters to aid them in deciding how to vote. A truly effective plan structured to facilitate and indeed invite timely publicity — as seems to have been true of the Florida program[169] — has the best chance of defeating a constitutional challenge.

B. *Self-Incrimination*

Another possible difficulty warrants comment. If there exist, at the same time, both requirements for disclosure and criminal sanctions for contributions excessive in amount, problems of self-incrimination arise; the contributor is in effect compelled to admit

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167 On this basis, the requirement in § 305 of the Federal Election Campaign Act of 1971 of reports from every person contributing an aggregate of over $100 in a calendar year would seem to prescribe too low a figure.

168 Contributions to a campaign in which there was no contest might be peculiarly suspect and warrant special treatment.

169 "I do not wish to exaggerate, but I frequently had to shove reporters out of the way before I could get the papers [Campaign Treasurer's Pre-Election Report] filed. . . . because they [reporters] would grab them just as soon as they came in. I had to plead with them to let me open the mail of the candidates, as they all stood around to get the figures. There was splendid publicity." Former Florida Secretary of State R.A. Gray, as quoted in *Roady, supra* note 111, at 438-39.

The provisions of Title III of the Federal Election Campaign Act of 1971 would seem to offer the possibility of an effective system of disclosure and publicity. Much will depend on its implementation by public officials and the alacrity of the press. Regulations concerning reporting of receipts and expenditures in congressional campaigns are the responsibility of the Secretary of the Senate and the Clerk of the House of Representatives. Federal Election Campaign Act of 1971 § 301(g). The Comptroller General has promulgated detailed regulations applicable to presidential campaigns. 11 C.F.R. 11.1 *et seq.*, 37 Fed. Reg. 6161-68 (Mar. 24, 1972).

to having broken the law. Statutes requiring those engaged in certain gambling activities to register and pay taxes were held invalid in *Marchetti v. United States*[170] and *Grosso v. United States*,[171] on the ground that compliance would give rise to substantial risk of conviction for violating federal or state law.[172]

Significantly, the Court took pains to distinguish and reaffirm *United States v. Sullivan*[173] in which the conviction of a bootlegger for failing to file an income tax return had been upheld. The Court in *Sullivan* had stated that the defendant's complete failure to file would have been unwarranted, because most of the information on his tax return would not have been incriminating, and suggested that he might have refused to respond to only those specific inquiries which would have elicited incriminating answers.

Marchetti distinguished *Sullivan* on the ground that every element of the gambling tax and registration requirements would have been incriminating, thus rendering irrelevant the possibility of partial compliance and partial assertion of the privilege suggested in *Sullivan*.[174] This point had been made in *Albertson v. Subversive Activities Control Board*:

> In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime.[175]

By this test, required disclosure of campaign contributions seems valid. There is no inherently suspect group singled out for inquiry and the program is essentially regulatory rather than crim-

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170 390 U.S. 39 (1968).
171 390 U.S. 62 (1968).
172 *See also* Haynes v. United States, 390 U.S. 85 (1968) (possession of an unregistered firearm), and Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965) (registration by individual members of Communist Party).
173 274 U.S. 259 (1927).
174 390 U.S. at 50-51.
175 382 U.S. 70, 79 (1965).

inal.[176] A contributor who had criminally exceeded a contribution ceiling could presumably refuse to report it. As suggested by the Court in *Sullivan*, he and others would continue to have to report contributions that were legal.

The converse approach would be to grant statutory immunity from criminal prosecution under federal or state law to anyone filing an incriminating report.[177] The Court in *Marchetti* held this solution unavailable as running contrary to the purposes of Congress in enacting the statute.[178] But an amendment to the National Firearms Act,[179] granting such immunity in order to overcome its invalidation under *Haynes v. United States*,[180] has been upheld.[181] Thus, in adopting new reporting legislation, Congress could decide whether it placed greater value on disclosure or on criminal prosecution, and could draft the statute in such fashion as to satisfy the self-incrimination requirements of the Constitution through sacrificing in instances of conflict whichever of the two facets of its program it preferred to subordinate.

Requiring the candidates themselves to report the contributions received and the expenditures made by them would give rise to analogous questions. If the candidate spent more than a criminal statute — or possibly a statute violation of which would deprive him of office[182] — permitted, requiring him to report that fact would raise the same problems, and could be met by the same solutions, as those suggested above in connection with illegal contributions.[183] If candidates also had to report the names of their

176 *See also* California v. Byers, 402 U.S. 424 (1971), upholding by a 5-4 vote a California law requiring an automobile driver involved in an accident to stop and furnish his name and address. There was no opinion of the Court. Four justices thought *Sullivan* to be applicable, while one based validity on a balancing of the regulatory needs of the state together with the limited nature of the required disclosure against the values protected by the privilege against self-incrimination. *Cf.* Mackey v. United States, 401 U.S. 667 (1971).

177 *Cf.* Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

178 390 U.S. at 58-60.

179 216 U.S.C. §§ 5812(a), 5861(d) (1970).

180 390 U.S. 85 (1968).

181 United States v. Freed, 401 U.S. 601 (1971).

182 *Cf.* Garrity v. New Jersey, 385 U.S. 493 (1967). Apart from questions of self-incrimination, legislation authorizing denial of federal elective office as a sanction for violation of expenditure ceilings or other campaign regulations might itself be unconstitutional in the light of the exclusive power of each House of Congress in such matters. See also text at note 116 *supra*.

183 If there is a requirement that reports of expenditures be broken down into

contributors and the amounts of their respective contributions, the issues discussed concerning the possible deterrent effect upon contributors above in connection with reporting by the contributors themselves, would apply equally here.

IV. Subsidies and Incentives

Most of the evils in present methods of campaign financing could be avoided, and the constitutional shortcomings of proposed remedies circumvented, if elections were paid for entirely out of public funds, or if inducement could be found to persuade large numbers of people to contribute small amounts individually. In a prepared statement delivered to the Subcommittee on Communications of the Senate Committee on Commerce, Herbert E. Alexander suggested:

> To counteract the advantages of incumbency or of wealth, we need not enact questionable ceilings but rather look toward establishing floors. By floors are meant minimal levels of access to the electorate for all legally qualified candidates. This shifts concern to guarantees of free broadcast time or free mailing privileges or subsidies that assure that candidates will get exposure to potential voters. Tax incentives, while not assuring minimal access for any candidate, are desirable in that they may help develop alternative sources of funds so that candidates can reduce their reliance upon large contributions from self, family, special interests or others.[184]

If sufficient campaign money were to come from such untainted sources, a candidate might hesitate before accepting additional funds offered through questionable channels. Not only might a point of diminishing returns be reached; overexposure might adversely affect the candidate's chances.[185]

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specific categories, there might be an additional possibility of self-incrimination based on the character of the expenditure reported. A report of "Bribes of voters: $500," for example, would incriminate the candidate, but only if he had authorized or participated in the crime.

184 *Hearings on S. 1, S. 382, and S. 956 before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., at 640 (1971).

185 It must be conceded, however, that apprehension of such a reaction on the part of the public has not seemed to deter huge contributions and expenditures seemingly intended to publicize the candidate *ad nauseam*. Perhaps more empirical data is needed as to the effectiveness of large expenditures by one candidate where

A. *Direct Appropriations*

As early as 1907 President Theodore Roosevelt urged direct government subsidization of election campaigns, as did former President Truman as recently as 1956.[186] In 1971, Joseph A. Califano, Jr., General Counsel of the Democratic National Committee, recommended outright prohibition of all private campaign contributions and expenditures, with campaigns to be financed entirely out of appropriations.[187]

At least two attempts by state governments to pay some of the expenses in that fashion were invalidated by the state courts.[188] In Puerto Rico the Commonwealth Government has had a subsidy program since 1957, apparently with at least partial success.[189] Although one of the state court decisions held state appropriations for subsidizing election campaigns invalid on the ground that they were not made for a "public purpose,"[190] there seems little doubt that the federal government may make such expenditures pursuant to its power to tax and spend for the general welfare.[191]

The really troublesome aspect of the subsidy proposal is the problem of minor parties. No satisfactory solution seems to have

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his opponent, although spending much less, is nevertheless able to obtain a reasonable amount of public exposure. If studies should show that in such cases apprehension of swamping by the communications of the better-financed candidate is in fact groundless, greater emphasis should probably be placed on providing "floors," rather than "ceilings." Subsidies would then be a particularly appropriate device for this purpose.

186 A. HEARD, THE COSTS OF DEMOCRACY 431 (1960).

187 *Hearings on S. 1, S. 382, and S. 956, supra* note 184, at 314 (testimony of Joseph A. Califano, Jr.).

188 *See* People *ex rel.* State Chairman v. Galligan (Colo. Sup. Ct. 1910) (unreported); Opinion of the Justices, 347 Mass. 797, 197 N.E.2d 691 (1964); Bottomly, *Corrupt Practices in Political Campaigns*, 30 B.U.L. REV. 380 (1950). There was no opinion in the Colorado case. The Massachusetts opinion was based on the dubious ground that subsidization of political parties was not a legitimate "public purpose" for expenditure of state funds. A clearer ground might have been either the shocking formula employed, which would have given the Democratic Party about four times the subsidy given the Republican, or possibly the interference with existing balances of intra-party committee structure. *See* Lobel, *Federal Control of Campaign Contributions*, 51 MINN. L. REV. 1, 57-58 (1966); Recent Case, 78 HARV. L. REV. 1260 (1965).

189 *See* P.R. LAWS ANN. §§ 601-11 (Supp. 1970); H. WELLS, GOVERNMENT FINANCING OF POLITICAL PARTIES IN PUERTO RICO (1961); H. WELLS & R. ANDERSON, GOVERNMENT FINANCING OF POLITICAL PARTIES IN PUERTO RICO: A SUPPLEMENT TO STUDY NUMBER FOUR (1966).

190 *See* Opinion of the Justices, 347 Mass. 797, 800-01, 197 N.E. 2d 691, 694.

191 *Cf.* United States v. Butler, 297 U.S. 1, 65, (1936).

been offered, and there is great doubt that any answer (short of the impracticable one of giving identical sums to every party or candidate that gets on the ballot)[192] would be constitutional.

The constitutional difficulties in modifying the equal time requirements of the Federal Communications Act to allow broadcasts by or debates between major party candidates are greatly enhanced when unequal subsidies are suggested. Instead of a difference in opportunities to use a government-licensed channel of communication, there would be outright discrimination among parties or candidates, in the allocation of public funds.[193] The same would be true of government payment in unequal amounts for candidates' broadcast time.[194] Politicians might disagree as to which handicap would be the more formidable — government discrimination in awarding of campaign funds or government discrimination in deciding which names are printed on the ballot and which must be written in. It is highly unlikely, however, that differential subsidies could withstand the test of *Williams v. Rhodes*.[195]

Formulae that have been proposed to cope with this problem appear unsatisfactory. Subsidies based on previous performance tend to lock the future into the patterns of the past. Use of the vote achieved at a prior election as a basis ignores the fact that minor parties come and go rapidly. What was left, in 1952, of Henry Wallace's Progressive Party? A subsidy based on his 1948 vote would have served only to artificially reactivate a movement that was probably dead. If historical accomplishments are the measure, new parties[196] such as George Wallace's American Independent Party in 1968 would have gone unsubsidized.

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192 It might not, however, be completely impossible politically to provide a small amount of "seed money" to each candidate — including, or even especially, in the primaries — so that candidates without financial backing might at least have the means to make a public appeal for contributions. Such a program might reduce dependence upon the "cocktail party circuit," in which some hopefuls are apparently compelled to compete for starting-up funds.

193 See Winter, *supra* note 108 at 70.

194 *Cf.* TWENTIETH CENTURY FUND, *supra* note 135.

195 393 U.S. 23 (1968); *cf.* Shakman v. Democratic Organization, 435 F.2d 267 (7th Cir. 1970); Recent Case, 84 HARV. L. REV. 1547 (1971).

196 One suggestion has been to advance money to new parties, with the proviso that they return it if they fail to achieve a specified portion of the vote. This probably draws on the analogy of the British practice of giving free time on

Furthermore, the role of such groups has been largely educational, bringing new ideas to the American public. Hope of victory has usually been quite remote. Examples in American history could be cited in which the proposals of minor parties have gradually gained adherence, then been adopted by one or both major parties, ultimately becoming law.[197] The task of these groups has generally been difficult enough; to add to their problems by making it still easier for the major parties to overwhelm their efforts would tend to silence one of the nation's most fruitful sources of new ideas.

Where the candidates of both major parties take essentially the same position on an important and controversial question, such as favoring continuation of the Vietnam War in the 1968 presidential campaign, the case against a program of granting larger subsidies to those candidates than are given to minor party opponents taking opposing positions seems especially strong. In Senate and House races, instances in which both major party candidates express indistinguishable views must often arise.

Thus the short-lived Long Act (the Presidential Election Campaign Fund Act of 1966)[198] was probably invalid. It would have allowed each taxpayer who elected to accept it an option to allocate $1.00 of his tax payment for placement in a presidential election campaign fund. The two major parties would have received payments from the fund, the amounts to be equal but based on their combined popular vote in the previous presidential election. Minor parties that had garnered over 5,000,000 popular votes would also have received payments, but their subsidies would have been significantly smaller, even in proportion to their vote, than that given to the major parties. Those parties which had drawn under 5,000,000 popular votes would have gotten nothing. The discrimination against small parties and new parties was blatant. Even though a strong showing might have been made that the

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government-owned radio and television to all candidates but to require each to deposit a fund that is forfeited if it fails to obtain one-eighth of the vote. Such a provision, in this country, could hardly fail to deter most new parties and minority candidates from participating.

197 *See* Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957). What has been said of such parties has also been true of minority candidates, with or without party assistance, and often at the stage of the primaries.

198 26 U.S.C. § 6096; 31 U.S.C. §§ 971-73 (1970).

necessity of freeing elections from the harmful influences of private contributions was desperately urgent, other less unfair means of curing this evil were clearly available.

This plan has recently been revived by Congress in a modified and somewhat less objectionable form. Title VIII of the Revenue Act of 1971[199] would permit a similar $1.00 check-off, but with the following differences: (a) "minor parties" (those that had secured between 5 and 25 percent of the popular vote in the previous presidential election) would be paid amounts from the fund computed on the basis of the ratio of their votes to the average of that of the major parties; (b) "minor parties" would receive additional amounts if their proportion of votes in the next election was higher than in the last, and smaller parties and new parties would also receive proportionate allocations based on their votes in the next election — but only, of course, after the election was over, since the votes would have to be counted first; (c) a taxpayer could designate the political party for whose presidential campaign he wanted his $1.00 to go. The fund would be financed by the dollars of those taxpayers who elected the check-off but did not designate the party they preferred.

Because of strong White House opposition, and perhaps the threat of a veto, the Revenue Act of 1971 as it emerged from the conference committee and as adopted will not apply to the 1972 presidential campaign. As it now stands, its effective date is January 1, 1973, and in the case of calendar year taxpayers the checkoff will first apply to 1972 income, the returns for which will be due April 15, 1973.

This law gives rise to some but not all of the constitutional problems associated with the Long Act. The formulae for payment to minor parties would be less discriminatory. Also, a party that surpassed its previous performance would receive additional money after the election. But if money is needed to obtain votes, and the votes obtained determine how much money one gets, the system seems inescapably reminiscent of "Catch 22."[200]

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199 Revenue Act of 1971 §§ 801-02, *amending* INT. REV. CODE of 1954, §§ 9001-13.

200 The inadequacy of the mere hope of future payments, based on good performance at the polls, is underscored by the direction in § 401 of the Federal Election Campaign Act of 1971 to the CAB, FCC, and ICC to promulgate regulations "with respect to the extension of credit, without security" by those subject

The most important distinction, however, is the availability to the taxpayer of the option to divert his dollar from the fund, and to designate the party to receive it. To this extent it is the taxpayer who decides the candidate to be helped, and the constitutional difficulty in having the government choose among political parties in the allocation of public money is avoided. The problem that remains, however, springs from the fact that the government does decide which parties receive what fractions of the money that was not designated by the taxpayers for specific parties.

Perhaps this can be analogized to the listing of only major party candidates on a printed ballot or voting machine, while supporters of others have to write in their names. The constitutionality of this procedure depends on the relative ease or difficulty with which additional parties or candidates can have themselves placed on the ballot.[201] The validity of the check-off law might thus depend on the relative difficulties encountered, not only by taxpayers in the seemingly simple operation of inserting in their tax returns the names of the parties they wish to support, but also of new and small parties in persuading taxpayers to designate them. To some extent, this is of course only another aspect of the difficulty such parties inevitably have in soliciting financial as well as electoral support. That the government would compound that difficulty by converting the failure of those parties to obtain support on the tax returns into a basis for giving larger amounts of government funds to their better-established opponents may create a constitutional problem.

These constitutional problems cannot be avoided on the ground that the grievance of the minor parties would be addressed merely to the denial of a benefit from government, rather than the imposition of a restraint. In striking down an overbroad loyalty oath, the taking of which was a condition for entitlement to a veteran's tax exemption, the Court, in *Speiser v. Randall*,[202] said: "The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not in-

to their jurisdiction. *See also* 18 U.S.C. § 591 (1970), as amended by § 201 of the Federal Election Campaign Act of 1971.

201 *Compare* Williams v. Rhodes, 393 U.S. 23, 33-34 (1968) *with* Jenness v. Fortson, 403 U.S. 431 (1971).

202 357 U.S. 513, 518 (1958).

fringe speech."[203] This would be true with respect to denials of equal protection through unequal application of benefits. Even under the "separate but equal" doctrine and the assumption that public education was a voluntary benefit conferred by the state, inequality between the races in the facilities offered was held invalid.[204]

This is not to say that no conceivable program of direct subsidies giving different amounts to major and minor parties could possibly be constitutional. There is a strong interest in freeing political campaigns from dependence upon private contributions which would have to be balanced against the unequal payments to minor parties.[205] If the latter were treated generously even though not equally, it might be shown that they were in fact accorded a better chance to convey their views to the voters than if all parties were dependent solely on private contributions. There are great difficulties, however, in devising a formula that would be both fair and practicable, since neither the record of the party in a previous election nor the number of signatures obtained on petitions offers a satisfactory measure.[206]

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203 *See also* Hannegan v. Esquire, Inc., 327 U.S. 146, 155-56 (1946).

204 Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938). The *Gaines* case was selected as an example because it involved admission to a state law school, thus eliminating any possible contention that the state is constitutionally required to provide free public education to the elementary and high school levels.

Even apart from these difficulties, subsidies to a party have to be given through a specified committee structure. A Recent Case Note in 78 HARV. L. REV. 1260, 1262 (1955) concludes that such action would constitute legislative interference with the internal balance of power among committees of the same party, thus constituting governmental intervention in an area that should be insulated therefrom under the first amendment.

205 In order to be eligible to receive payments from the Fund established by Title VIII of the Revenue Act of 1971, major parties would have to certify that, with minor exceptions, they would limit their expenditures to the amount so provided and accept no contributions from other sources, and other parties would have to certify that they would not incur expenses greater than the amounts that major parties would be paid from the Fund. INT. REV. CODE of 1954, § 9003, as added by § 801 of the Revenue Act of 1971.

206 The dilemma of finding ways to provide subsidies to serious candidates without either having to give equal amounts to large numbers of others lacking substantial actual or potential appeal, or discriminating in the award of government funds against some candidates in favor of others, has its counterpart in the problems involved in repealing the equal time provisions applicable to broadcasting, discussed above. The constitutional difficulties would seem even more acute with respect to subsidies, however, in view of the directness and immediacy of the government's role in the discrimination.

B. *Tax Incentives*

One of the few proposals that does not seem to give rise to serious constitutional difficulties is the use of federal income tax deductions or credits to encourage small contributions from great numbers of people.[207] The hope is that sufficient funds could be obtained in this fashion to reduce or eliminate the dependence of candidates upon large contributions.[208] This approach avoids the constitutional difficulties inherent in direct subsidies and tax check-off plans that include a formula determined by the government dictating in whole or in part the basis upon which the funds are to be allocated among political parties.

Congress has recently provided taxpayers with the choice of either credits or deductions for political contributions in title VII of the Revenue Act of 1971. Unlike the check-off provisions, this title will go into effect sufficiently soon to have possible impact on the 1972 elections, as it will apply to tax returns on 1972 income. The choice for each taxpayer will be a credit against federal income tax equal to half of his political contributions, up to a maximum credit of $12.50 per individual or $25.00 per joint return; or a deduction from taxable income of up to $50 per individual or $100 per joint return.

Senator Gore once suggested that such action might be an invalid delegation to the taxpayers of congressional authority to determine how public funds should be spent.[209] But deductions for a wide range of purposes — even in areas where the government could not subsidize directly, such as contributions to religious organizations — have a long history. Credits for private purposes like business investment in new facilities have also been in effect for many years, apparently without constitutional challenge. The advantage of the tax incentive, from the standpoint

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207 *See generally* H. ALEXANDER, TAX INCENTIVES FOR POLITICAL CONTRIBUTIONS? (1961).

208 A few states give deductions from their own income taxes for political contributions up to a certain amount. *See, e.g.*, MINN. STAT. ANN. § 290.21 (Supp. 1971). The rates of state income taxes are generally too low, however, for this to serve as much of an incentive.

209 *See* 112 Cong. Rec. 13544-47 (1966); Alexander, *Financing Presidential Elections*, 17 JAHRBUCH DES OFFENTLICHEN RECHTS DER GEGENWART (NEUE FOLGE) 573, 604 (1968).

of constitutionality, is that it permits the realities of the campaign — the relative importance of the major versus the minor candidates — to be reflected through the separate decisions of millions of taxpayers, thus relieving the government of the necessity and the onus of making those decisions itself.

Of course the government would be participating to a degree in the unequal provision of funds to contending candidates or parties through its subsidization of the choices made by the taxpayers. But, as mentioned above, deductibility of contributions to religious organizations has apparently never been challenged under the establishment clause.[210] Equal protection arguments would probably also fail. In the example of religious contribution deductions it might be shown that the availability of such deductions affected various religions differently. A denomination with mostly poor members might be able to point out that it benefitted much less than one with wealthier adherents (*i.e.*, the Black Muslims vs. the Episcopalians), as to both the total amount of deductions taken and the tax brackets of the average contribution; yet it is extremely unlikely that a challenge based on those facts would be deemed substantial.

To establish his right to take a credit or deduction, the taxpayer would presumably have to produce evidence of his contribution. This leaves open the danger of disclosure to the Internal Revenue Service of his political affiliation, and might have some deterrent effect on supporters of unpopular parties or candidates, or even of the major party then out of power. Any number of mechanical methods can be devised, however, to provide evidence of the fact of the contribution without disclosing its beneficiary.[211]

In deciding between credits, deductions, or giving the taxpayer a choice between them as has been done, questions of policy rather than constitutionality predominate. As implied in connection with religious contributions, deductions — as distinguished from credits — allow the high bracket taxpayer's contribution to

210 *Cf.* Walz v. Tax Comm'n, 397 U.S. 664 (1970), upholding exemption of church real estate from property taxes; Bittker, *Churches, Taxes and the Constitution*, 78 YALE L.J. 1285 (1969). Validity of deductions would seem to follow *a fortiori*.

211 *See, e.g.*, H. ALEXANDER, *supra* note 207 at 37-55. It is hoped that the Commissioner of Internal Revenue will use his authority to issue regulations concerning the manner in which contributions are to be verified for purposes of validating the credits and deductions authorized by Title VII of the Revenue Act of 1971 in such a manner as to enable the taxpayer to withhold the identity of the recipient.

cost him proportionately less than his poorer counterpart, or alternatively, allow him to contribute a larger amount at the same expense to himself. Even if this disparity involved a significant constitutional problem, it might be justified because of the net benefit to be achieved through encouraging large numbers of small contributions from middle class taxpayers.[212]

A tax credit does not involve the same questions of inequality. Nevertheless, it has been pointed out that 21 percent of the population who file federal income tax returns paid no tax,[213] and many more are not obliged to file returns at all. Ways could be devised to provide them with government vouchers in the amount of the credit allowed, to transmit to the candidates or parties of their choice. Although this was not done in the 1971 Act, the point may be made that such discrimination as there may be against the poorest citizens — even if it were significant constitutionally — would be outweighed by the spreading of the sources of candidate support over a much wider base.

Whether credits were allowed for the full amount of a campaign contribution, or only for half as under the 1971 law, would not seem to be important from a constitutional standpoint. But the amount of the maximum permissible credit might well be. To state an extreme case, a maximum credit of $1,000,000 would augment rather than limit the evils sought to be eliminated, giving an incentive to potential contributors of excessive amounts to redouble their activities, and clearly discriminating against less wealthy taxpayers. Thus, the level set might have significant effects on who contributed, and how much, and the extent to which dependence by candidates on large contributions could be avoided. The limits in the new statute of $12.50 (or $25) on credits[214] and of $50 (or $100) on deductions[215] would seem to be reasonable.[216]

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212 Title VII of the Revenue Act of 1971 tends also to discriminate against some taxpayers by making the option of the deduction unavailable to those who take the standard deduction rather than itemizing. This could, of course, have been avoided by permitting even standard deduction taxpayers to deduct this item separately.

213 *See* H. ALEXANDER, *supra* note 207, at 19.

214 INT. REV. CODE of 1954, § 41(b)(1), added by § 701 of the Revenue Act of 1971.

215 *Id.* § 218(b)(1), added by § 702 of the Revenue Act of 1971.

216 As the new law apparently makes the credit or deduction available for contributions to any candidate, party committee, or committee supporting a candi-

C. *Other Subsidy Proposals*

Instead of giving a tax deduction or credit, the government might simply match contributions of private individuals. Here, as in the case of the tax credit, there would seem to be few constitutional difficulties if the ceiling were kept within reasonable limits. The government would not itself be choosing among candidates or parties in allocating benefits; it would merely be reflecting the decisions of individual citizens. In a sense, deductions are a form of matching by the government, and this proposal would merely be their counterpart adminstered outside of the tax system.

Beyond this, there is the possibility of tax deductions for a candidate's expenditures. A candidate for public office may not under present law deduct his expenses in running for that office whether he wins or loses.[217] This adds to the already serious difficulties of the potential candidate without personal or family fortune or affluent supporters. Deductibility of these expenses — presumably up to a specified limit, depending on the office sought — would in some measure reduce these obstacles. It could be contended that such a measure unreasonably discriminated in favor of higher bracket taxpayers, since they would ultimately bear a smaller fraction of their campaign costs. If the question is of constitutional dimension at all — which seems unlikely — it might be necessary to obtain more facts as to whether on balance deductibility would help or hurt the competitive position of non-affluent candidates.

There are some additional, potentially useful, proposals for partial government subsidization of campaign expenses that seem to raise no constitutional problems whatever. One is to have printed and distributed to all voters at government expense brochures setting forth the biographies of each of the candidates and perhaps statements of limited length by each. All candidates would be treated equally, with position in the brochure determined in a fair manner, as by lot. These pamphlets would resemble the material distributed in many communities by the League of Women Voters. Another is to give candidates a postal frank, en-

date, possible problems of tampering with the relative strengths of various groups within a party (see note 204, *supra*) would seem to have been avoided.

217 McDonald v. Commissioner, 323 U.S. 57 (1944).

abling them to mail campaign literature to voters (perhaps up to a limited amount) without paying postage. In addition to its general helpfulness, this might tend to reduce part of the advantage incumbents of federal office presently have.[218]

V. Control of Prices for Certain Types of Campaign Expenditures

One proposal has been advanced to forbid specified communications media — notably broadcasters, newspapers and magazines — from charging higher rates for campaign advertising than their lowest unit rates for commercial advertisers purchasing large blocks of time.

Recent legislation does not go quite this far; it does, however, forbid broadcasters to charge for political broadcasts more than "the lowest unit charge of the station for the same class and amount of time for the same period" during the 45 days before the primary and the 60 days before the election,[219] while leaving applicable to other periods the previous requirements of section 315(b) of the Communications Act, which limited the price to that charged for comparable use by other users.[220]

The latter standard is also imposed upon charges to candidates for newspaper and magazine space, during any period.[221] Restraints on communications media inevitably suggest first amendment problems. But what would be interfered with would not be the content of the message, broadcast or printed, but rather the commercial practices of the company engaged in the business. Those aspects of communication businesses have never been exempted from regulations of general applicability.[222]

Here, however, these media would be singled out for special

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218 The frank is of course not supposed to be used for the political mail of Congressmen, but all sorts of information may be disseminated by them under the frank, which, while not openly taking the form of campaign literature, tends in fact to have that effect.

219 § 315(b)(1) of the Communications Act of 1934, added by Federal Election Campaign Act of 1971, § 103(a).

220 *Id.* § 315(b)(2), added by the same part of the same act.

221 *Id.* § 103(b).

222 *Cf.* Associated Press v. United States, 326 U.S. 1 (1945) (antitrust laws); Associated Press v. NLRB, 301 U.S. 103 (1937) (National Labor Relations Act).

treatment. If it could be shown that the regulation was confiscatory, or was intended to put them out of business or discriminate against them in favor of other, unregulated, methods of communication, there would be a strong argument that their first amendment rights (and those of their listeners and readers) were being impaired.[223] But a mere requirement that certain of their rate structures be equalized can scarcely be so characterized. The schedules of advertising rates charged by a newspaper or broadcaster seem just as fully within the business aspects of their activities as the amounts they pay their employees,[224] their relationships with labor unions,[225] or their restraints on competition[226] — all of which have been held within congressional regulatory power.[227]

In the case of broadcasters, congressional authority is particularly clear. Indeed, if Congress were to require all broadcasters to carry reasonable amounts of political advertising free of charge, its power to ensure that licensees used their facilities in the public interest would undoubtedly be sufficiently broad to sustain the provision.[228]

VI. Conclusion

The fact that there may be some questions as to the constitutionality of almost all of the proposals recently adopted or seriously advanced to remedy shortcomings in our methods of financing election campaigns does not argue for abstention from constructive efforts to achieve improvements. Anything relating to the election process touches so closely upon the most fundamental values in our constitutional system that delicate issues involving the balancing of those values must inevitably arise. The presence of these problems, far from discouraging affirmative action, should serve as a spur to thoughtful analysis in order to achieve the greatest

223 *Cf.* Grosjean v. American Press Co., 297 U.S. 233 (1936).

224 *E.g.*, Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946).

225 *E.g.*, Associated Press v. NLRB, 301 U.S. 103 (1937).

226 *E.g.*, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

227 A state statute limiting charges by newspapers for political advertisements to the rates charged for commercial advertisements was upheld in Chronicle & Gazette Publishing Co. v. Attorney General, 94 N.H. 148, 48 A.2d 478 (1946), *appeal dismissed*, 329 U.S. 690 (1947).

228 *Cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). *See also* E. Pound, Canto LXXIV: "free speech without free radio speech is as zero."

possible enrichment of the quality of our political processes consistent with the smallest possible interference with other interests deserving of protection.

Of the more significant techniques discussed herein, limitations upon the expenditures of candidates appear to give rise to the most intractable constitutional problems. For such regulation to be both practicable and effective, some power probably has to be conferred upon a candidate to veto expenditures that others would wish to make in his support. This will apparently be the effect of section 104(b) of the Federal Election Campaign Act of 1971. Suppression of speech and press in this fashion, although done by the candidate pursuant to governmental authority rather than by the government itself, would seem to violate the first amendment.

On the other hand, measures to impose reasonable limits on the size of contributions, to limit the personal expenditures of candidates and their families, to require effective disclosure and publicity of large donations, and to give tax credits and perhaps deductions to encourage large numbers of people to contribute small sums each, if taken together might well achieve most of the goals of expenditure limitations with far less impingement upon fundamental rights. While the constitutionality of some of these proposals is not entirely free from doubt, they would appear on balance to be valid.

Substantial progress has been made in recent months. But it is not likely that the laws just passed will prove to be satisfactory long term answers to all of the difficult problems with which they were intended to cope. Further analysis — of the constitutional as well as the policy questions raised — is surely going to be needed

STATUTE

THE OWNER-BUILDER: ANALYSIS AND RECOMMENDATIONS

Introduction

Three years after the release of the comprehensive Douglas Commission[1] and Kaiser Committee[2] reports, the national dialogue on "the housing problem" continues. While officials of the Department of Housing and Urban Development (DHUD) are proud of the 700 percent increase in subsidized housing since the appearance of these reports,[3] the President has expressed understandable concern over the $200 billion which the federal government may eventually have to pay out to subsidize these mortgages.[4] The Tennessee Homebuilders Association adopts the motto "Stay Alive with 235,"[5] referring to the popular new homeownership program for low- and moderate-income families.[6] Secretary of DHUD George W. Romney complains that the program is out of control, with the realtors and home builders running wild, leaving him to take the blame for their conduct.[7] The death of the filter-down theory is being declared,[8] tenant-management and maintenance problems are being seriously discussed,[9] and The New Technology

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1 NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. (1968).

2 THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME (1968).

3 Lilley, *Urban Report*, 3 NATIONAL JOURNAL 1535 (1971).

4 H.R. DOC. NO. 92-136, 92d Cong., 1st Sess. 22 (1971).

5 Lilley, *supra* note 3, at 1541. The staff of the House Committee on Banking and Currency has charged that "in many areas of the country, the 235 program is 'carrying' the real estate market." *Hearings on HUD Investigation of Low- and Moderate-Income Housing Programs*, 92d Cong., 1st Sess. 103 (1971) [hereinafter cited as *HUD Investigation Hearings*].

6 National Housing Act § 235 (1949), 12 U.S.C. § 1715z (1970), *added by* Housing and Urban Development Act of 1968 § 101(a), 82 Stat. 476, 477 (1968).

7 Lilley, *supra* note 3, at 1537.

8 Wellfeld, *A New Framework for Federal Housing Aids*, 69 COLUM. L. REV. 1355 (1969); Schechter & Schlefer, *Housing Needs and National Goals*, in HOUSE BANKING & CURRENCY COMMITTEE, PAPERS SUBMITTED TO SUBCOMMITTEE ON HOUSING PANELS ON HOUSING PRODUCTION, HOUSING DEMAND, AND DEVELOPING A SUITABLE LIVING ENVIRONMENT, 92d Cong., 1st Sess. 2, 33-35 (1971) [hereinafter cited as PAPERS].

9 *See, e.g.*, DEP'T OF HOUSING AND URBAN DEVELOPMENT (DHUD), THE LANDLORD-TENANT RELATIONSHIP, A SELECTED BIBLIOGRAPHY (1971); NONPROFIT HOUSING CENTER, OEO FUNDED HOUSING PROGRAMS (1971); Bryan, *Public Housing Modernization is*

is being explored.[10] Unfortunately, the average cost of Operation Breakthrough houses is $22,410,[11] the tenants are not all cooperating,[12] and a major critic of filter-down suggests supporting it with housing subsidies for the middle-class.[13] A suburban housewife wonders on national television, "Who said this community was built for families? It was built for houses."[14] Investors and wealthy people favor the new tax inducements,[15] but some tax experts

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Bringing Not Only Modernized Buildings but Modernized Tenant/Management Relationships, 28 JOURNAL OF HOUSING 167 (1971); Curzan, *Housing and the Role of the Large Corporate Enterprise* in PAPERS 196; Kuzmack, *Private Realtors, Public Housing Tenants Work Together to Manage Public Housing*, 28 JOURNAL OF HOUSING 229 (1971).

10 DHUD's "Operation Breakthrough" is the principal effort, a program authorized in 1968, Housing and Urban Development Act of 1968, § 108, 12 U.S.C. § 1701z. *See also* DHUD, OPERATION BREAKTHROUGH: QUESTIONS AND ANSWERS (1971); DHUD, OPERATION BREAKTHROUGH: MASS PRODUCED AND INDUSTRIALIZED HOUSING, A BIBLIOGRAPHY (1970); ARTHUR D. LITTLE, INC., PROJECT INFILL: AN EXPERIMENT IN HOUSING TECHNOLOGY (1971); *Systems-Built Low-Cost Housing Project Wins Design Award*, 27 JOURNAL OF HOUSING 595 (1970). A. Dietz, The Investigation of the Applicability of Industrialized Systems Building to the Requirements of the State University Construction Fund (1971) (xerox copy, State University of New York, Albany, N.Y.) provides an excellent and comprehensive discussion of numerous explorations of The New Technology.

11 LOW INCOME HOUSING BULLETIN, Sept., 1971, at 2. "The average construction costs of new private housing show $19,925 for detached houses and $16,400 per unit in multifamily structures." *Id.* Operation Breakthrough has identified the major obstacles to mass production of housing as "diversified local building codes, restrictive land use and zoning regulations, and rigid work practice requirements." DHUD, OPERATION BREAKTHROUGH: QUESTIONS AND ANSWERS 13 (1971).

12 *See, e.g.*, L. RAINWATER, BEHIND GHETTO WALLS (1970); *Tenants Win Acceptance of Demands During NAHRO National Housing Workshop*, 27 JOURNAL OF HOUSING 502 (1970); *Tenant-Management Issues*, 27 JOURNAL OF HOUSING 534 (1970). Although DHUD is unable to provide any current statistics, it is widely believed that tenant and management problems in the new section 236 (National Housing Act § 236, 12 U.S.C. § 1715z-1 (1971)) projects are resulting in a number of "turn-back's" of title to DHUD. Letter from Mr. Peter M. Balitsaris, Mortgage Finance Department, National Association of Home Builders, Oct. 10, 1971.

13 Wellfeld, *supra* note 8.

14 CBS Reports, *But What If the Dream Comes True?* (Nov. 25, 1971).

15 INT. REV. CODE of 1954, § 167(j) allows use of the 200 percent instead of 150 percent declining balance depreciation method only on "new residential rental property"; § 167(k) permits the taxpayer to compute depreciation with respect to rehabilitation expenditures on low-income rental housing using a five-year useful life under the straight line method and disregarding any salvage value; § 1250 retains recapture provisions favorable to rental and low-income rental property; § 1039 provides for a tax-free sale of a qualified housing project if the owner reinvests in another qualified housing project. *See also* Lane, *New Developments in Taxes and Federally-Assisted Housing*, in C. EDISON, NEW DEVELOPMENTS IN LOW AND MODERATE INCOME HOUSING 569 (1971); R. KASTER & S. BERMAN, SUBSIDIZED HOUSING: TAX & PROFIT OPPORTUNITIES IN SELLING & BUYING (1971).

strongly oppose the use of the tax structure to effect a housing policy.[16] The problems of housing abandonment are being addressed in the media.[17] Building and housing codes and standards are being subjected to continued and controverted scrutiny,[18] and some uniformity is emerging.[19] Attitudes among code and standards professionals are changing also.[20] There are prognostications about a sharply rising manpower demand in the housing industry, and doubts whether it can be met.[21] Few people now expect that the nation will meet its semi-official goal of 26 million housing units by 1980. It has been recognized that rural areas contain a disproportionate share of inadequate housing;[22] however rural areas

16 *See, e.g.*, Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83. HARV. L. REV. 705 (1970); Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970); Dodyk, *The Tax Reform Act of 1969 and the Poor*, 71 COLUM. L. REV. 758, 779 (1971); Ritter & Sunley, *Real Estate and Tax Reform: An Evaluation of the Real Estate Provisions of the Tax Reform Act of 1969*, 30 MD. L. REV. 5, 37 (1970).

17 *See, e.g.*, series of articles by Barlett and Steele in The Philadelphia Inquirer, Aug. 22, 1971 to present; Herbers, *Federal Housing Abandonment Blights Inner Cities*, N.Y. Times, Jan. 13, 1972, at 1, col. 1; Lilley and Clark, *Federal Programs Spur Abandonment of Housing in Major Cities*, 4 NAT'L J. 26 (1972). *See also* Sternlieb, *Abandonment & Rehabilitation: What Is To Be Done?* in PAPERS 315; Lydens & Philpott, *Rehabilitation*, in C. EDISON, NEW DEVELOPMENTS IN LOW AND MODERATE INCOME HOUSING 535 (1971).

18 *See, e.g.*, note 11 *supra*; U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM (1966); MOOD, LIEBERMAN & SUTERMEISTER, HOUSING CODE STANDARDS: THREE CRITICAL STUDIES (National Commission on Urban Problems Research Report No. 19, 1969); S. PARRATT, HOUSING CODE ADMINISTRATION AND ENFORCEMENT (1970); Jackson, *Housing Code Inspection Subjected to Some Critical Comments and Some Suggestions for the Future*, JOURNAL OF HOUSING, Oct., 1970; Field & Ventre, *Local Regulation of Building: Agencies, Codes, and Politics*, 1971 MUNICIPAL YEARBOOK 139.

19 *See* Field & Ventre, *supra* note 18; *see also* Schechter & Schlefer, in PAPERS 137.

20 *See, e.g.*, Field & Ventre; Mood, Lieberman & Sutermeister, *supra* note 18.

21 *See, e.g.*, Dunlop & Mills, *Manpower and Construction: A Profile of the Industry and Projections to 1975*, in THE REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, II: TECHNICAL STUDIES 239 (1968); THE SECOND ANNUAL REPORT ON NATIONAL HOUSING GOALS BY THE PRESIDENT, H.R. DOC. NO. 292, 91st Cong., 2d Sess. 35 (1970); Mills, *Housing and Manpower in the 1970's* in PAPERS 287; Schechter & Schlefer, *id.* 13.

22 *See, e.g.*, J. FRIED, HOUSING CRISIS U.S.A. 130, 196 (1971); THE PRESIDENT'S NATIONAL ADVISORY COMMISSION ON RURAL POVERTY, THE PEOPLE LEFT BEHIND 93 (1967); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH 23 (1968); DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT/DEPARTMENT OF AGRICULTURE INTERAGENCY TASK FORCE, REPORT ON RURAL HOUSING, at 115 CONG. REC. 28,724 (1969) (extension of remarks of Mr. Patman); THE PRESIDENT'S TASK FORCE ON RURAL DEVELOPMENT, A NEW LIFE FOR THE COUNTRY 37 (1970); Cochran & Rucker, *Every American Family Housing Need and Non-response* in PAPERS 525.

continue to receive approximately the same percentage of the federal housing funds.[23] Housing has always been cited as an important factor in the rural to urban migration of low income people,[24] and a recent study done for the Office of Economic Opportunity indicates that this continues to be so.[25]

A prominent Washington housing lawyer and former general counsel to DHUD's predecessor agency[26] calls this "a watershed period for housing: the existing programs are in decline, and the search is on for new alternatives."[27] There appears to be an increasing congressional interest in rehabilitation of existing structures, as evidenced by the doubling of the DHUD fiscal year 1972 request for rehabilitation funds from $35 to $90 million.[28] Proposed legislation also abounds.[29] Housing allowances are being seriously studied,[30] and DHUD has requested proposals from consulting firms to conduct a large scale research and demonstration program using them.[31] One common theme in the current housing discussion expresses dissatisfaction with the federal government's historical concentration on subsidizing production (the supply side of the market), with a consequent neglect of the "consumers" of the housing units (the demand side).

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23 J. FRIED, *supra* note 22, at 130; Cochran & Rucker, *supra* note 22; Kummerfeld, *The Housing Subsidy System* in PAPERS 454.

24 *See, e.g.*, Pearson, *The Significance of Housing in Rural-Urban Migration*, LAND ECONOMICS, Aug., 1963; ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH 17 (1968); THE PRESIDENT'S TASK FORCE ON RURAL DEVELOPMENT, A NEW LIFE FOR THE COUNTRY 37 (1970).

25 W. HAMILTON ET AL., THE CAUSES OF RURAL TO URBAN MIGRATION AMONG THE POOR 159 (1970).

26 The Housing and Home Finance Agency.

27 Milton P. Semer, also former staff counsel for the Senate Banking and Currency Subcommittee on Housing and Urban Affairs from 1955-60, in Lilley, *Urban Report*, 3 NAT'L J. 1543 (1971).

28 Lilley, *id.* 1541.

29 *See, e.g.*, H.R. 9688, 92d Cong., 1st Sess. (1971) (Patman), calling for expanded rehabilitation in urban areas, an expanded housing allowance program, and block grants of subsidies to metropolitan areas; H.R. 7836, 92d Cong., 1st Sess. (1971) (Casey), providing for up to $750 in tax deductions for rehabilitation expenses; and S. 1724, 92d Cong., 1st Sess. (1971) (Mondale), which would provide mortgage interest subsidies for rehabilitation expenses.

30 *See* deLeeuw, *The Housing Allowance Approach* in PAPERS 541. deLeeuw's paper is based on research done by the Urban Institute under contract to DHUD as the foundation for the demonstration program noted in text at note 31, *infra*. Authority for this research is found in the HUD Act of 1970 § 504, 12 U.S.C. § 1701z-3 (1970).

31 Request For Proposals No. H-11-72, entitled *Housing Allowance Experimental Program*, issued Nov. 5, 1971.

One phenomenon of the housing production "industry" neglected in the dialogue has been that of "self-help" in general and of "owner-built" housing in particular. The Kaiser Committee Report mentioned owner-builders in passing, but did not discuss them "because they are not in the housing production business on a commercial basis."[32] The Douglas Commission Report ignored them altogether. Owner-built housing is a census category defined as "homes started for exclusive use of the owner on his own land but with the owner acting as his own general contractor or performing some or all of the construction labor."[33] During the past decade owner-builders have accounted for approximately 20 percent of all single family home starts annually,[34] about 10 percent of all housing starts. [35] Twenty years ago this former figure was as high as 33 percent, with even larger ratios in rural areas.[36] Yet the owner-builder is all but ignored by federal and state programs.

The purpose of this Note is to examine the owner-builder phenomenon, as well as major legislative, administrative, and other legal and non-legal constraints on owner-building, and to propose ways of fostering this approach. Statutory recommendations and drafts follow.

I. Self-Help and Owner-Building

A. *Mutual Assistance*

"Self-help" and "owner-building" in the production of housing obviously runs a gamut of personal involvement, from the time-honored rugged individual to fully organized mutual-help programs comprised of numerous families and individuals.

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32 The President's Committee on Urban Housing, A Decent Home 150 (1968).

33 DHUD, 1969 HUD Statistical Yearbook, GS Table 97 (1970).

34 Bureau of the Census, Department of Commerce, Construction Reports 7 (1969).

35 The President's Committee on Urban Housing, A Decent Home 151 (1968).

36 DHUD, Summary Report on a Study of Self-Help Housing in the United States (unpublished Aug. 15, 1969, report by Secretary George W. Romney to the House Banking and Currency Committee, copy received from the Office of the Assistant Secretary for Research and Technology, DHUD, Oct. 26, 1971) 27, citing S. Maisel, House Building in Transition 344 (1953). *See also* Housing and Home Finance Agency, Housing in the United States 57 (1949) (26 percent) and *id.*, Ideas and Methods Exchange Bulletin, No. 54, at 2 (1959) (3 percent in 1949).

Amish barn raisings have always been part of American lore, along with similar forms of practical group charity and cooperation. However, the first significant mutual self-help housing effort organized by a public body or social agency occurred in 1933, in Westmoreland County, Pennsylvania. The County Relief Board sought to get unemployed coalminers "back to the farm" by forming a self-sufficient community. The participants were paid for one quarter of their labor, and by 1940 approximately 250 units had been completed. The community exists to this day.[37] The American Friends Service Committee sponsored another coalminers project in 1937 in Western Pennsylvania, producing 50 homes. In 1938, some coalminers in Nova Scotia were organized by a local university to build the first mutual-help cooperative in Canada.[38] Puerto Rico was the next site for organized mutual-help housing. Since 1949 over 30,000 rural families have been housed in this way, resulting in by far the largest organized mutual- or self-help housing effort to date in this country.[39] In the early 1950's, Flanner House, an Indianapolis settlement house, initiated a mutual-help program which has become widely known for its success,[40] demonstrating that mutual-help is a viable technique of home construction for moderate income people.[41] In the 1960's, programs for migrant and seasonal agricultural workers sprouted in various places, most notably in Florida and California. A California program, Self-Help Enterprises, Inc., was an outgrowth of another American Friends Service Committee project, and is today the largest and most successful mutual-help housing program in the continental United States, having produced over 1000 homes.[42]

Funds for these organized efforts came from two major sources, the Department of Agriculture's Farmers Home Administration (FmHA)[43] and the Office of Economic Opportunity.[44] The FmHA

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37 ORGANIZATION FOR SOCIAL AND TECHNICAL INNOVATION, SELF-HELP HOUSING IN THE U.S.A., A PRELIMINARY REPORT 28 (1969) [cited hereinafter as OSTI REPORT].

38 R. MARGOLIS, SOMETHING TO BUILD ON 19 (1967).

39 OSTI REPORT 28-29.

40 R. MARGOLIS, *supra* note 38, at 21 (1967).

41 OSTI REPORT 29.

42 Telephone conversation with Mr. Robert Marshall, Executive Director, Oct. 27, 1971.

43 42 U.S.C. §§ 1471, 1472 (1970).

44 42 U.S.C. §§ 2861 *et seq.* (1970).

provides insured loans to low-income families for 33 years at sliding interest rates;[45] OEO provides monies for project organization and technical assistance.[46] FmHA assistance is limited to projects in localities with a population of 10,000 or less,[47] although until recently it was 5,500, and before 1965, 2,500.[48]

In 1961, the Congress authorized DHUD's predecessor, the Housing and Home Finance Agency, to make grants for the purposes of "developing and demonstrating new or improved means . . . of providing housing for low income persons and families."[49] In 1968, this was amended specifically to call for "the study of self-help in the construction, rehabilitation, and maintenance of housing for low-income persons and families and the methods of selecting, involving, and directing such persons and families in self-help activities."[50] The Secretary of DHUD was at the same time charged with making a report to Congress setting forth the results of self-help studies and demonstrations, "with such recommendations as he deems appropriate."[51] This report was made by DHUD to the Congress on August 15, 1969,[52] on the basis of a study of twenty-seven housing programs, nine of which were self-help or mutual-help programs.[53] It was found that mutual- and self-help housing had been successfully constructed in all climates, in both rural and urban areas, by people of both sexes, various

45 42 U.S.C. § 1472 (1970).

46 42 U.S.C. § 2861 (1970).

47 42 U.S.C. § 1490 (1970).

48 The 5,500 limit was established by the Housing and Urban Development Act of 1965 § 1007, 79 Stat. 455, 502, adding § 520 to the Housnig Act of 1949, 42 U.S.C. § 1490. The 2,500 was a matter of administrative policy on the part of the FmHA. The 5,500 figure was reportedly due to a typographical error. The amendment was introduced by Rep. Harlan Hagen of California (111 CONG. REC. 15,252 (1965)) at the behest of the directors of the Self-Help Enterprises, Inc., program, who were seeking a 5,000 limit. Their draft was typed by the mother of the Executive Director of the local OEO-CAP program, and the error, at 5,500, was not noticed until it later became law. Telephone conversation with the erstwhile OEO-CAP Director, Oct. 28, 1971.

49 Housing Act of 1961 § 207, 75 Stat. 149, 165; § 207 was repealed by The Housing and Urban Development Act of 1970 § 503, 84 Stat. 1770.

50 The Housing and Urban Development Act of 1968, § 1714(a), 82 Stat. 476, 607.

51 *Id.*, § 1714(b), *repealed by* The Housing and Urban Development Act of 1970 § 503, 84 Stat. 1770.

52 Summary Report on a Study of Self-Help Housing in the United States. *See* note *supra* 36.

53 *Id.* 6-8.

racial origins, and different socio-economic statuses.[54] It found that the principal difference between commercial and self-help construction was in the speed rather than the quality of the work[55] and that mutual-help participants attained an unusually high equity-to-income ratio.[56] Furthermore, a substantial reduction of costs to both the participant and the public was achieved.[57] The report recognized the opportunity costs to the individual, but pointed out that these varied enormously depending on a complex set of circumstances.[58] In summary, DHUD reported to Congress, "It is evident that self-help methods, properly applied, increase housing production, decrease costs to the user and to the public, and contribute to the elimination of the symptoms and cause of poverty."[59]

However, the statutory authority for the self-help demonstration projects was repealed by the HUD Act of 1970,[60] and since the appointment of Eugene R. Gulledge, Assistant Secretary for Production, DHUD has maintained a very low profile in the area of fostering helf-help.[61] Despite provisions in the 1968 HUD act that call for the Secretary of DHUD to provide technical assistance and starting-up funds to non-profit organizations involved in self-help and other programs,[62] DHUD has not sought appropriations to do so. The 1970 act strengthened these provisions,[63] and DHUD

54 *Id.* 10, 11.
55 *Id.* 29.
56 *Id.* 34.
57 *Id.* 36.
58 *Id.* 29, 30.
59 *Id.* 36.
60 § 503, 84 Stat. 1770 (1970).
61 Conversation with several professionals involved in self-help housing in various roles revealed a uniform conviction of Mr. Gulledge's decided lack of enthusiasm over self-help. Cited were his pre-DHUD position in the housing industry, speeches he had made, and actions he had or had not taken. Mr. Gulledge felt he had to allay fears about his attitude towards non-profit sponsors of housing in a speech noted in Keys, *The Role of Nonprofit Sponsors in the Production of Housing* in PAPERS 173.
62 82 Stat. 476, 490 (1968). The 1970 HUD Act provided for an "Assistant to the Secretary [of DHUD], designated by the Secretary, who shall be responsible for providing information and advice to nonprofit organizations desiring to sponsor housing projects assisted under programs administered by the Department." 42 U.S.C. § 3533(d) (1971). The Commissioner of FHA has recently been named to fill the slot. 72 Housing Affairs Letter 4 (1972).
63 12 U.S.C. § 1701x (1971).

is reportedly requesting, "as the result of Congressional prodding," a one million dollar budget allocation from the Office of Management and Budget.[64] The Department hopes that this will "signify tacit approval of the self-help housing approach by the present administration."[65] However, Assistant Secretary Gulledge is reported to have indicated that he will not spend the money if it is approved.[66] There is currently a Departmental Task Force studying self-help housing, and it is to make recommendations to the Secretary on its findings.[67]

One seasoned observer of HUD's changes in self-help policy has expressed this opinion:

> HUD's hostility to self-help is not so much a matter of deliberate policy as it is program structure. HUD is programmed to serve realtors, builders, title searchers, appraisers and consultants . . . it's surrounded by an industry. . . . [M]ost self-help sponsors simply are not large enough to support the scale HUD prefers. . . . HUD would rather be making 235 commitments in blocks of hundreds. Some HUD field people say frankly that they do not wish to be bothered with fewer than 70 units at a time.[68]

Whether a question of policy or program structure, organized self-help housing programs do not at this time enjoy a favorable status with DHUD.

The HUD Act of 1968 authorized the Farmers Home Administration of the Department of Agriculture to administer a program of technical assistance grants to mutual self-help sponsor organiza-

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64 Letter to author from Mr. Mark Sullivan for Mr. Harold B. Finger, assistant secretary of DHUD for Research and Technology, undated, received Oct. 24, 1971.

65 *Id.* This "tacit approval" is a somewhat weaker commitment to self-help than the advisory service the Office of Research and Technology promised in its fiscal 1972 budget justification and program description. *Hearings on HUD-Space-Science Appropriations for 1972 Before the Subcomm. on HUD-Space-Science of the Housing Committee on Appropriations*, 92d Cong., 1st Sess., pt. 2, at 960. (1971). Mr. Sullivan failed to mention the service in response to the author's inquiries regarding DHUD's intentions for self-help. Mr. Finger failed to mention it in his testimony at the Hearings, *id.* 1022-23, and a reliable, confidential source in DHUD indicated in a Jan. 11, 1972 telephone conversation that the Department is not committed to implementing it. The program appears broader than the one proposed in this note, although there are similar components.

66 Telephone conversation with confidential source as above, Nov. 8, 1971.

67 Letter form Mr. Mark Sullivan, *supra* note 64.

68 Letter to author from Mr. Clay L. Cochran, Executive Director, Rural Housing Alliance, Nov. 16, 1971.

tions, and to establish and operate a land loan revolving fund.[69] The regulations for this "Section 523" program were delayed, and at least one person believes the delay was deliberate.[70] Although FmHA is unable to produce any current statistics upon request,[71] anywhere from ten to twenty projects, it is estimated, are now operating with funds from this program.[72]

B. *The Owner-Builder Phenomenon*

The "owner-builder," or independent self-helper, is virtually ignored by government programs at all levels. Yet, as has been pointed out, owner-built houses account for 10 percent of all housing starts and for approximately 20 percent of the single-family home starts.[73] In 1949, owner-builders were producing 34 percent of the single family dwellings.[74] Today, about 60 percent of single-family homes are constructed by corporations or individuals in the home-building business, 20 percent by contractors for owners on the owner's property (i.e., custom-built homes), and the remaining 20 percent are built by owners.[75]

Owner-building occurs at all income levels in amounts which approximate the general income distribution.[76] About one fourth

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69 82 Stat. 476, 553, adding § 523 to the Housing Act of 1949, 42 U.S.C. § 1490c (1970).

70 Letter from Mr. Clay L. Cochran, *supra* note 68.

71 Letter from Mr. Robert E. Nipp, Acting Director of Information, FmHA, U.S. Dep't of Agriculture, Dec. 1, 1971.

72 Letter from Mr. Clay L. Cochran, *supra* note 68. Latest available FmHA statistics, found in a non-FmHA source, indicate that during the first six months of fiscal 1972, 188 loans and grants were made under this program. Rural Housing Alliance, THE RHA REPORTER, March, 1972, at 3.

73 See text at notes 32 and 33, *supra*.

74 HOUSE AND HOME FINANCE ADMINISTRATION, IDEAS AND METHODS EXCHANGE BULLETIN, No. 542 (1959).

75 Schecter & Schlefer, in PAPERS 44, based on BUREAU OF THE CENSUS, DEP'T OF COMMERCE/DHUD, CONSTRUCTION REPORTS, CHARACTERISTICS OF NEW ONE-FAMILY HOMES, C-29 SERIES (no date given); *id.*, C-25 SERIES (1969) [hereinafter cited as C-25 SERIES], *Table 1B: New Privately Owned One-Family Units Started, by Purpose of Construction.* The 1969 Reports, based on a national, random sample survey of 1491 units, are used herein to coordinate with the best available data on certain characteristics of owner-builders. See note 76 *infra*.

76 Data in this Note on family and income characteristics of owner-builders are based on unpublished materials (computer print-outs) which were in part the basis for the document BUREAU OF THE CENSUS, DEP'T OF COMMERCE/DHUD, HOUSING SURVEYS, PARTS 1 & 2; PART 1, OCCUPANTS OF NEW HOUSING UNITS; PART 2, MOBILE HOMES AND THE HOUSING SUPPLY (1968). This data, the latest available, was gathered in a single random, national sample of 298 owner-builder families.

of all owner-builder households earn less than $6,000 per year, 12 percent earn less than $4,000, and about 50 percent of the owner-builder population are below the median income. Yet less than 18 percent of the single-family housing constructed can be afforded by the population below the median income. Also, while nearly 25 percent of the owner-builders earn less than approximately $6,000 a year, only 3 percent of the housing constructed for sale is purchased by families with an income of $6,000 or less. More than 25 percent of new single-family homes acquired by newly formed households are owner-built. Owner-builder families are mostly native to the given area, with 86 percent having moved less than 25 miles to the site of their new home. Geographically, 70 percent of the owner-builder households are found outside of Standard Metropolitan Statistical Area (SMSA's).[77] They are therefore a phenomenon characteristic of rural areas and small towns, with a significant percentage occurring in or near large cities. Indeed, outside of SMSA's, owner-built houses account for 38 percent of the housing starts, while contractor- and developer-built houses each account for only 31 percent.[78] Thus, the builders who produce homes for profit serve the SMSA's well, but apparently cannot supply the non-SMSA population with housing as well as owner-builders can. Occupationally, owner-builders cover a broad spectrum and are not disproportionately connected with the construction trades or industry. About one fourth act as general contractor only, doing none of the work themselves; about 16 percent of the homes are constructed entirely by the owner, with the remaining 59 percent of the owner-builders both contracting out and doing some part of the work themselves.

The homes produced average about 1,324 square feet,[79] with 56 percent having three bedrooms and 32 percent having two bedrooms or less.[80] Half of the units have only one bathroom[81] and 88

77 BUREAU OF THE CENSUS, DEP'T OF COMMERCE/DHUD, CONSTRUCTION REPORTS, CHARACTERISTICS OF NEW ONE-FAMILY HOMES, 1968, C-25 SERIES (1969), *Table 2A: New Homes Sold or Started for Owner Occupancy, by Region and Location.*

78 *Id.*

79 *Id., Table 4A: New Homes Sold or Started for Owner Occupancy, by Median and Average Square Feet of Floor Area.*

80 *Id., Table 5: New Homes Sold or Started for Owner Occupancy, by Number of Bedrooms in Home.*

81 *Id., Table 6: New Homes Sold or Started for Owner Occupancy, by Number of Bathrooms in Home.*

percent are single story dwellings.[82] Homes with less than 800 square feet, no bathroom and one bedroom account for less than 4 percent of the total.[83] Physical amenities and size vary considerably among regions of the country.

Financing for the owner-built homes comes from several sources. More than half are financed by conventional bank or savings and loans mortgages, 41 percent by cash or non-mortgage transactions, and only 6 percent by the Federal Housing Administration or the Veterans Administration.[84] Banks and savings and loan institutions are willing to extend long term credit to owner-builders in slightly fewer cases than to developer-built home purchasers, 53 percent and 62 percent respectively; yet federal mortgage assistance goes to one in three developer-built homes but to only one in sixteen, or 6 percent of owner-built homes.[85] The private sector apparently considers owner-builders to be better financial risks than does the federal government.

The benefits of the owner-building approach accrue to the owner-builder himself, to his community, and to the nation. The owner-builder can realize a broad range of savings in his costs; indeed, the process may be his only available means of achieving home ownership. Data from a recent sampling of owner-builders in Northeastern suburban communities indicates that they contribute about 36 percent of all construction labor, at a savings of between 20 and 30 percent over what a comparable contractor-built house would cost.[86] The real saving comes from acting as one's own contractor, in personally securing any sub-contractors necessary for specialized tasks such as wiring and plumbing, and in doing other typical contractor's tasks.[87] For some families owner-building presents the only chance for ownership, to build up equity, and take advantage of the usual tax deductions of mortgage interest payments and property taxes. In addition, the approach affords the possibility of a greater control over the design, quality, and con-

82 *Id., Table 7: New Homes Sold or Started for Owner Occupancy, by Number of Stories.*

83 *Id.*, extrapolation from tables.

84 *Id., Table 3A: New Homes Sold or Started for Owner Occupancy, by Type of Financing.*

85 *Id.*

86 W. Grindley, The Suburban Owner-Builder ch. 2 (unpublished M.I.T. Master's Thesis in draft).

87 *Id.* ch. 3.

struction of the final product. While this may be a mixed blessing, it does permit the builder to engage in incremental development of his home as needs demand, priorities dictate, and finances permit. The skills and commitment developed in the process serve as the best tools and greatest assurance of maintenance and upkeep.

To be sure, there are costs to the owner-builder. A basic question is whether this alternative is cheaper for him than remaining at his regular employment (and possibly taking overtime work) while engaging professionals to do the work. This of course assumes the availability of professionals, overtime work, adequate financing, and satisfactory available housing alternatives. There also are considerable demands of time and energy, as well as possible strains on family and on regular work. The ultimate cost-benefit calculation is a matter of individual circumstances. Thus, the decision can only be individual. However, this is the attractive feature of the method: the responsibility of choosing among the housing alternatives is the individual's. Other costs to the owner-builder include the resources expended in coping with numerous institutional obstacles to owner-building, as outlined below. That the benefits outweigh these costs to a significant proportion of the populace seems clear by the number of people choosing self-help.[88]

For the community, responsible owner-building can contribute to the new housing stock, to the tax rolls, and to the stability of the population. The likelihood of quality maintenance increases. The public housing burden is to some degree reduced. The paeans sung over the virtues of home ownership are relevant here, with reference to both the individual and the nation. The nation benefits significantly in terms of increased housing.[89] The self-resolution of the housing shortage by those unwilling or unable otherwise to afford housing eases the strains on the costly subsidy and public housing programs for low income families. Owner-building is also a check on the rural to urban migration pattern that has caused severe housing problems in urban areas, because it *pro tanto* keeps people out of the cities and roots them in the non-SMSA areas. It also fosters an investment and stability that are necessary to stem the tide.

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88 See text at note 73 *supra.*
89 *Id.*

This sketch of the benefits of the owner-building method is meant to be merely suggestive. With adequate support there is reason to believe that these benefits could be substantially increased. This belief stems not merely from a good feeling about owner-building, but rather from the fact that owner-built housing comprises a significant proportion of the nation's housing stock in spite of the lack of encouragement found in the various controlling statutory and administrative frameworks. Given the high interest rates and construction costs which have been plaguing the housing industry, this optimism only becomes stronger.

II. Current Legislative and Administrative Problems

At present, little official assistance, either financial or technical, is given to the owner-builder, and there is much that hinders him. To the extent that he is a participant in an organized, mutual self-help program, he receives aid as outlined earlier.[90] But if he is an independent owner-builder, he is left mostly to his own devices.

A. *Statutory*

1. Federal

A survey of federal legislation indicates that only one program offers financial assistance to low- and moderate-income owner-builders, the Department of Agriculture's "Section 502" program.[91] This loan program enables one to purchase a site and construct a dwelling at a current interest rate of 7.25 percent for 33 years.[92] Families with an annual income of less than $5,000, with some exceptions, can qualify for an "interest credit" that will reduce the rate to as low as 1 percent.[93] The use of the interest subsidy, as well as the size of the loans made, has steadily increased, although there are indications that the analogue in DHUD, the section 235 program, provides a deeper subsidy.[94] If a family has

90 See text at notes 43 and 69 *supra*.
91 Housing Act of 1949 § 502, 42 U.S.C. § 1472 (1970).
92 FmHA Instruction 440.1, Exhibit B; 7 C.F.R. § 1822.8(c) (1971).
93 42 U.S.C. § 1490a (1970).
94 Rural Housing Alliance, Farmers Home's Interest Credit Program: The First Two Years (1971).

an income considered to be insufficient to repay the loan, a person with adequate repayment ability may co-sign.[95] The authorization of funds for 1972 under this program requires that at least 50 percent of the loans be made to low-income families.[96] The FmHA is unable to say how many owner-builders have been assisted under section 502.[97] Although the introductory sections to the 1968 Act establishing the section 235 program stress the congressional intent of the use of self-help techniques,[98] there is no mention of a provision for them in the section itself. The traditional FHA "203" mortgage insurance programs likewise make no mention of owner-builders or self-help,[99] although loans are made under it, as testified to by statistics[100] and federal officials.[101] This is apparently a matter of accommodation, as there is nothing in the statutory or regulatory[102] materials which provides for such loans; hence, the owner-builder is placed at the absolute mercy of the local FHA office. There are two insured loan programs[103] to assist the poor, rural owner-occupant in making minor repairs on his house. These programs are specifically aimed at low-income people who do not qualify for the full 502 loan program. They are noteworthy because they permit less than complete finishing or full amenities and equipment.[104] The only existing program of technical and financial

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95 42 U.S.C. § 1472(a) (1970).

96 Administration Letter 68 (444) (1971).

97 Letter from Mr. Robert E. Nipp, see note 71 *supra*.

98 The Congress declares that in the administration of those housing programs authorized by this Act which are designed to assist families with incomes so low that they could not otherwise decently house themselves, and of other Government programs designed to assist in the provision of housing for such families, the highest priority and emphasis should be given to meeting the housing needs of those families for which the national goal has not become a reality; *and in carrying out of such programs there should be the fullest practicable utilization of the resources and capabilities of private enterprise and of individual self-help techniques.* [Emphasis added.] 12 U.S.C. § 1701t (1970).

99 12 U.S.C. § 1709 (1970).

100 Materials provided by Mr. William F. Shaw, Chief, Statistics Branch, FHA, DHUD, in Dec. 8, 1971 letter to author.

101 Mr. William F. Shaw, note 100 *supra*; telephone conversation with Public Information Officer, DHUD Boston Area Office, Dec. 10, 1971; interview with Public Information Officer, DHUD San Francisco Regional Office, Dec. 28, 1971.

102 24 C.F.R. § 203 (1971).

103 42 U.S.C. § 1474 (1970); 7 C.F.R. § 1822.18 (1971).

104 7 C.F.R. §§ 1822.18(c), 1822.22, 1822.24, 1822.27 (1971).

assistance to self-help housing, FmHA 523, is presently strictly limited to organized rural self-help groups — the individual owner-builder acting on his own does not qualify.[105] Although authorized to provide technical assistance, DHUD has chosen not to follow the Congressional directives in that regard.[106]

There are numerous regulatory restrictions which limit the use of the major FmHA programs. The definition of "rural," for example, refers to communities of not more than 10,000,[107] a limit only recently raised from 5,500.[108] Yet the FHA as a matter of course does little in communities of under 25,000.[109] An applicant who is not a farmer must be of low or moderate income, must be without "decent, safe, and sanitary housing for his own use," and must be working in, if not living in, the rural area.[110] He must also be "without sufficient resources to provide on his own account the necessary housing, buildings, or related facilities, and be unable to secure the necessary credit from other sources upon terms and conditions which he reasonably could be expected to fulfill, including a Federal Housing Administration (HUD) section 235 insured mortgage."[111] Although he should be able to meet his operating expenses, family expenses, and debts (including the proposed loan), he may be able to qualify for interest credit assistance if his income is not sufficient to meet the loan payments.[112] These credits are supposed to be made to those with adjusted annual income of less than $5,000, and in no case are they to be made to those with income over $8,000.[113] A recent administrative order has cut off the ability of the FmHA to handle section 235 loans,[114]

105 42 U.S.C. § 1490c(a) (1970).

106 See text at note 66 *supra.*

107 42 U.S.C. § 1490 (1970).

108 See note 48 *supra.*

109 DHUD/USDA INTERAGENCY TASK FORCE, REPORT ON RURAL HOUSING in 115 CONG. REC. 28,724 (1969); *see also* letter of July 1, 1969 from Rep. Patman to Secretary George W. Romney, *id.*; Clay L. Cochran, Chairman, National Rural Housing Coalition, Statement on Major 1971 Housing Legislation Before the Senate Comm. on Banking, Housing, and Urban Affairs, 92d Cong., 1st Sess., Sept. 17, 1971 (mimeographed copy 10).

110 7 C.F.R. § 1822.4(a)(1) (1971).

111 *Id.*, § 1822.4(a)(2).

112 *Id.*, § 1822.4(a)(4). Of course the eligible applicant must "possess the character, ability, and experience to carry out the undertakings and obligations required of him in connection with the loan." *Id.* § 1822.4(a)(5).

113 *Id.* § 1822.7(n)(i)(a).

114 Administration Letter 68 (444) (1971).

in direct conflict with the legislation, by which the Secretary of DHUD is to allocate to the Secretary of Agriculture, for use in rural areas and small towns, "a reasonable portion of the total authority to contract to make assistance payments" as approved in the relevant annual appropriations acts.[115] Congress' intent that the Secretary of Agriculture use section 235 was underscored by its authorization of funds to cover the expenses of doing so,[116] yet this intent is being ignored. As a result, the use of a major potential source of financial help for owner-builders is limited.

Some serious problems in the administration of the programs through which an owner-builder might secure assistance hamper his participation. Very few owner-builders have made use of section 235 to date.[117] Aside from lack of information and knowledge of the program, many potential owner-builders are denied access to section 235 subsidies by the procedure of reserving these funds only for commercial contractors[118] who build many units at a time. This eases the burden of paper-work, since commercial builders are usually familiar with FHA procedures. This practice also avoids having to deal with owner-builders, who are often considered unreliable, time-consuming clients. Some of these commercial builders, on the other hand, have seriously abused the section 235 program and the purchasers of their inferior products, as a recent congressional investigation has shown.[119] So far, only

115 12 U.S.C. § 1715(k) (1970).

116 42 U.S.C. § 1483 (1970).

117 Letter from Mr. William F. Shaw, Chief, Statistics Branch, FHA/DHUD, Dec. 8, 1971. His best estimate was that 0.9 percent of all section 235 loans in the first nine months of 1970 had been for the purpose of "financing new construction," and that owner-builders did not comprise the bulk of the recipients. Officials in two Regional Offices indicated that the chances of an owner-builder getting any aid under section 235 were virtually nil, and that in any event he would have to build it before he could qualify. Telephone conversations with Mr. Andrews, Boston Area Office 235 Specialist, Dec. 16, 1971, and with Mr. Segaguchi, San Francisco Regional Office 235 Specialist, Dec. 29, 1971. The estimate by Mr. Shaw would appear to conflict with the regulation which states that "a mortgagor eligible under section 235 will, to the maximum extent feasible, be given opportunity to contribute the value of his labor as equity in his property." DHUD, HOMEOWNERSHIP FOR LOWER INCOME FAMILIES (SECTION 235), Bulletin HPMC-FHA 4441.1A, Sept. 1971, No. 21. However, the procedure mentioned in note 118 *infra* indicates that the owner-builder probably will not get the opportunity to contribute his labor, or at least that he will have to make advance arrangements with the builder with the 235 reservations to do so. *Id.* No. 17.

118 *Id.* No. 38.

119 *HUD Investigation Hearings.*

one DHUD Regional Office (San Francisco) has begun to experiment with the granting of section 235 funds to single households, although they are not owner-builders. [120]

As for the Farmers Home Administration program, until recently local agents were required to have academic degrees in agriculture,[121] even though they may have had nothing to do with it after joining FmHA. These agents consequently often have less experience in housing and housing related concerns than their job typically demands. This leads to a bias against owner-builders, who present a somewhat unknown entity and a source of possible difficulty. More important in FmHA's reluctance to support owner-builders is the practice that the local agent personally countersign all checks drawn on supervised bank accounts containing loan funds for building in process.[122] This makes him even more wary of owner-builders as compared to known commercial builders.

A third FmHA obstacle to owner-builders is derived from the program's greatest strength, its decentralized form of administration. According to the American Friends Service Committee:

> Discretionary power at the disposal of the County Supervisor can be a real asset if the supervisor is motivated to use the regulations to make the maximum use of available funds to serve the poor. One would hesitate to urge strict regulations and procedures where no step can be taken without checking the regulations or where every deviation from the norm had to be referred to a higher bureaucratic level. The great

120 An estimated 1,500 lower income families will receive section 235 reservations under a program currently being organized in which the San Francisco Regional Development Fund will screen applicants in a nine-county area, then refer for lender and DHUD processing families it has certified as eligible (following an eight-week counseling program sponsored by local junior colleges and conducted by professionals and "community people"), and furnish information and training in basic home maintenance and management. The program is to be called The Buyer's Agent and Rental Advisory Service. San Francisco Development Fund, Summary, Buyer's Agent and Rental Advisory Service (1971); telephone conversation with Mr. Howard Schuman, of the Fund, Dec. 29, 1971. This will be the second experimental program the Fund has run in the homeownership field, the first also having been conducted in cooperation with DHUD, which successfully generated a method for identifying low income families with potential for competing in the homeownership market, and a counseling program that developed this potential and equipped the families to take advantage of small housing subsidies. *See* E. EUDEY, A MOVE TO HOME OWNERSHIP (1970).

121 Telephone conversation with Mr. Jennings Orr, Chief, Single Family Homes Division, FmHA, Dep't of Agriculture, Dec. 13, 1971.

122 *Id.*

> advantage of the FmHA loan program is the *potential* for humane consideration of each individual client, as opposed to the bureaucratic procedures of the Federal Housing Administration, where the client never sees or deals with the bureaucrat who turns him down. However, this same discretionary power can totally undermine the purpose of the program when in the hands of one not sympathetic to the poor, the Black or those needing special consideration.[123]

Instances of abuse of this discretionary power have recently been documented, including numerous incidents of racial discrimination toward Black and Spanish-speaking families.[124] Such cases are not uncommon, especially in the South, when individual families have attempted to utilize the section 502 program. This bias is manifested by withholding or distortion of important information, by refusing to process owner-builder applications, attempting to dissuade families from seeking assistance, and by refusing to approve loan applications for fabricated reasons.[125]

The FmHA is seriously understaffed, both in Washington where an $800 million loan program must be administered,[126] and in the field offices where the local agents have a range of responsibilities that spreads their energies almost as thin. The paperwork involved in the FmHA procedures is regularly criticized by those who must use them. One commentator refers to "the paper jungle involved in getting an FmHA mortgage," and charges that "this extraordinarily complex wall of forms and documents has isolated the FmHA from much contact with the poor — except for impecunious lawyers."[127] Finally, charges have been made that the FmHA field offices engage in "skimming off" many clients who actually could get credit at commercial institutions by sending low risk applicants to commercial institutions where it is known they will be refused. In this way, it is said, the FmHA office is able to

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123 STUDIES IN BAD HOUSING IN AMERICA: ABUSE OF POWER 20 (1971).

124 *Id.*

125 *Id.*

126 Cochran, *Statement from Rural Housing Alliance* in *Hearings before the Subcomm. of the Senate Comm. on Appropriations on H.R. 17923*, 91st Cong., 2d Sess., 1646 (1970).

127 Troy, *An Evaluation: Self-Help Projects Have Special Virtues and Pains*, 2 SOUTH TODAY 11 (1971).

maintain a good record for itself.[128] The effect of such skimming on needy, potential owner-builders is clear.

2. State

A survey of state agencies which might possibly have provided assistance to owner-builders revealed that the few actually doing so are not acting in any comprehensive fashion. The California Department of Housing and Community Development provides "technical assistance to 'self-help' housing groups" of "families working together to build their own homes."[129] Under the California Department of Veteran Affairs' Cal-Vet housing program, a veteran can secure financial assistance to build his own home.[130] The Maine Housing Authority will assist the owner-builder "in locating plans or contacting precutting firms or modular firms," and will also buy mortgages on owner-built homes from a lending institution.[131] The new Minnesota Housing Finance Agency expects procedures to be developed to permit the financing of owner-built housing.[132] The North Carolina Housing Corporation indicates it would like to purchase low income mortgages but has been unable to do so "due to conditions in the bond market."

As for technical assistance to owner-builders, the North Carolina State University Extension Service renders "a great deal" of such aid.[133] The Florida Department of Community Affairs, Division of Economic Opportunity, provides technical assistance "to groups and organizations seeking to help bring decent housing to the poor;" yet, while apparently most sympathetic to the owner-built approach, it has no specific facilitating programs.[134] The Michigan State Housing Development Authority will provide

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128 *The Battle Over Rural Housing*, SAVINGS AND LOAN NEWS, June, 1971.

129 Letter from Mr. Donald R. Crow, Administrative Assistant, Department of Housing and Community Development, Dec. 9, 1971.

130 *Id.*

131 Letter from Mr. Eben L. Elwell, Director, Maine Housing Authority, Dec. 8, 1971.

132 Letter from Mr. James J. Solem, Director, Office of Local and Urban Affairs, Minnesota State Planning Agency, Dec. 20, 1971.

133 Letter from Mr. Luther C. Hodges, Associate Director, North Carolina Housing Corporation, Dec. 13, 1971.

134 Letter from Mr. Hubert D. Thomas, STAP Housing Specialist, Division of Economic Opportunity, Dep't of Community Affairs, Dec. 30, 1971.

"complete financial and technical assistance," including mortgages, site inspections, and architectural recommendations of blueprints. However, since Michigan requires that an owner have a builder's license before he can do his own general contracting, the Authority has not yet seen an owner-builder home erected under its program.[135] The Maryland Department of Economic and Community Development will provide mortgage insurance to owner-builders, as well as information about helpful programs, grants and other financing opportunities, and assistance in drawing up applications.[136] In addition, the Department is establishing a "housing information system," which it expects will include information pertinent to owner-building.[137] The Hawaii Housing Authority can provide a long term mortgage for an owner-builder, but has no program of technical assistance.[138] Negative replies to an inquiry regarding availability of technical and financial assistance for owner-builders were received from the pertinent state agencies in Delaware,[139] Massachusetts,[140] New Jersey,[141] New York,[142] Ohio,[143] Pennsylvania,[144] Vermont,[145] and West Virginia.[146] No replies were forthcoming from Alaska, Connecticut, Illinois, or Missouri.

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135 Letter from Mr. Doug Smith, Housing Development Officer, Michigan State Housing Development Authority, Jan. 14, 1972.

136 Letter from Mr. Louis Peddicord, Executive Assistant, Dep't of Economic and Community Development, Dec. 23, 1971.

137 *Id.*

138 Letter from Mr. Robert E. Cooper, Development Administrator, Hawaii Housing Authority, Dep't of Social Services and Housing, December 16, 1971.

139 Letter from Mr. Ronald L. Stephens, Housing Specialist, Division of Housing, Dep't of Community Affairs and Economic Development, Dec. 8, 1971.

140 Letter From Ms. Joy Conway, Public Information Officer, Massachusetts Housing Finance Agency, Dec. 8, 1971.

141 Letter from Mr. Vincent R. Zarate, Public Information Officer, New Jersey Housing Finance Agency, Dep't of Community Affairs, Dec. 13, 1971.

142 Letter from Mr. Samuel G. Lutzker, Director, Research and Information Bureau, Division of Housing and Community Renewal, Dec. 20, 1971.

143 Letter from Mr. W. A. Losoncy, Executive Director, Ohio Housing Development Board, Dec. 16, 1971.

144 Letter from Mr. Alan V. Moony, Jr., Pennsylvania Housing Agency, Dec. 21, 1971.

145 Letter from Mr. Charles F. Black, Commissioner, Division of Banking, Dep't of Banking and Insurance, Dec. 13, 1971.

146 Letter from Mr. Tinsley A. Galyean, Jr., Executive Vice President, West Virginia Housing Development Fund, Dec. 20, 1971.

B. *Other*

Other "legal" impediments to owner-building may be grouped into three main categories: zoning and subdivision regulations; building codes and standards; and housing codes and standards.

1. Zoning and Subdivision Controls

Zoning and subdivision controls limit the scope for owner-building primarily by requiring large lots for single family construction and by compelling a developer or builder to provide certain infra-structure facilities and amenities. Both of these controls lead to higher unit site costs, and hence to higher total housing costs, thus significantly reducing the number of persons who can afford to build.[147] Such regulations are commonly found in suburban communities which seek to stem the tide of migration from central cities to the suburbs and to reduce rapidly rising public infra-structure and school costs.[148] They may also seek to limit the entry of "undesirable" low- and moderate-income families into suburban communities. The most important consequence of this sort of regulation, however, is to eliminate opportunities for owner-builders, a third of whom currently live in metropolitan areas.[149]

Restrictive zoning also affects conventional housing production and costs, since the same regulations that constrain owner-building also limit conventional commercial housing construction. These costs are rising more rapidly than others: during the 1966-70 period they increased at an average yearly rate of 6.5 percent, while wholesale prices and consumer prices rose only 3 percent and 5 percent respectively.[150] It has been suggested that, given the high

147 These restrictive ordinances also severely limit the supply of low and moderate income housing generally. *See, e.g.*, A. MANVEL, LOCAL LAND AND BUILDING REGULATION 3 (National Commission on Urban Problems Research Report No. 6, 1968). They also reduce the opportunities for innovation in building technology. *See* DHUD, OPERATION BREAKTHROUGH: QUESTIONS AND ANSWERS 13 (1971).

148 Gold & Davidoff, *The Supply and Availability of Land for Housing for Low- and Moderate-Income Families*, THE REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, II TECHNICAL STUDIES 287, 360 (1968).

149 See text at note 77, *supra*.

150 Schussheim, *National Goals and Local Practices: Joining Ends and Means in Housing*, in PAPERS 151.

level of site costs and local reluctance to re-zone "downward," housing costs could be reduced by building and housing code revisions which permit more modest designs.[151] This is in effect what many low-income owner-builders already do, hoping to enlarge or improve their homes in the future as resources permit. This, of course, is only a way of mitigating, rather than solving, the zoning problem.

2. Building Codes and Standards

Building codes and standards, as distinguished from housing codes and standards, are mainly concerned with factors of structural safety. Building codes regulate some aspects of design, specify permissible building materials and construction methods, and otherwise ensure the "soundness" of the dwelling, both in itself and in relation to neighboring structures.

Practically all municipalities have building codes. Over 70 percent of cities with 5,000 or more population have codes which are based on national or regional model codes.[152] But only about 25 percent of these have adopted at least 90 percent of the improvements suggested by model code organizations.[153] Although the Federal Government (through DHUD's Operation Breakthrough program) and many large commercial builders have pressed for a more unified system of codes, there still remains a great deal of diversity in local building codes.[154] Variations in local codes also hinder innovations in materials, construction, and production of housing.[155] Variations often prevent potential owner-builders from building in their preferred locations. This can be a critical constraint on those families for whom owner-building is the only way of gaining improved housing conditions. It may also mean an

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151 If Federal and State Governments encouraged developers to work at higher site/value ratios, through appropriate incentives, the result could be the reappearance of 800 and 900 square-foot units containing minimal custom features and maximum use of standard (and precast) elements. In this way, the annual supply of $10,000-$15,000 one-family housing might be substantially increased. Gold & Davidoff, *supra* note 148, at 375.

152 Field & Ventre, *Local Regulations of Building: Agencies, Codes, and Politics,* 1971 MUNICIPAL YEARBOOK 139, 144 (1971).

153 A. Manvel, *supra* note 147, at 3.

154 *Id.*

155 *See* DHUD, OPERATION BREAKTHROUGH: QUESTIONS AND ANSWERS 13 (1971).

increase in construction costs, and the consequent reallocation of scarce resources from other high priority needs to housing, if construction is still possible at all.

Building codes and standards have three general characteristics which hamper owner-builders. First, in spite of repeated attempts to develop a coherent set of generally applicable rules, there is no agreement on what constitutes reasonable and realistic standards.[156] In fact, there is much controversy as to whether there should even be such unified norms. As a result, there is considerable confusion regarding what constitutes acceptable construction, which makes it even more difficult for the owner-builder.

Second, in spite of the expressed concern of building codes and standards with dweller safety, they often tend to be biased toward the needs of housing suppliers, financiers, developers, or tradesmen rather than toward the needs of dwellers.[157] Building standards provide for designs and modes of construction that can be safely financed by commercial lenders; that can be built with a maximum of profit to the commercial builder; and that can only be built with certain materials and by certain methods. Codes do not crop up in a political vacuum; rather they are drafted and enforced in specific political and economic environments.[158] These constraints severely limit the owner-builder's flexibility and often raise his initial costs. Indeed, they may prevent him completely from building.

The third limiting characteristic of building codes is the underlying assumption that considerable experience is required to build a house, and that this expertise is the province of a select group which does not include owner-builders. Consequently, severe but often unjustified restrictions are placed on the owner-builder's ability to control or otherwise participate in the design and construction of his house.

A pressing constraint for owner-builders is the high level of "minimum" standards contained in most federal, state and local codes. While in principle building standards seek to improve a community's general welfare,

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156 *See, e.g.*, works cited in note 18 *supra.*
157 See text at note 164 *infra.*
158 Field & Ventre *supra* note 152, at 139.

> in practice, codes share the weakness of other regulations in that their uniform applications prohibit certain transactions in the market which would bring consumers closer to optimality, *as they perceive it.* As such, they inhibit resource redistribution and restrict consumer sovereignty. [emphasis added][159]

This restriction on free choice particularly affects low-income households (including owner-builders) who usually cannot afford "standard" housing; however, it also affects a growing number of middle income owner-builders as well, as standards rise and costs accordingly increase.

As noted in a recent issue of *HUD Challenge,* an official publication of the United States Department of Housing and Urban Development, "after more than 37 years of existence, the HUD FHA minimum property standards serve as the bible of the construction industry for housing."[160] These standards influence most residential building almost as much as local codes. The standards developed from the National Housing Act of 1934, whose major purpose was:

> to encourage improvement in housing (and building) standards and conditions in order to provide a system of mortgage insurance. The MPS [*i.e.,* minimum property standards] established property requirements intended to provide the minimum essentials necessary for a property to be considered economically sound security for mortgage insurance purposes.[161]

After World War II, FHA reissued its minimum property standards in 50 different publications to provide guidelines for all FHA offices and regions.[162] The diversification generated many

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159 Burns & Mittelbach, *Efficiency in the Housing Industry,* THE REPORT OF THE PRESIDENT'S COMMITTEE ON URBAN HOUSING, II TECHNICAL STUDIES 98 (1968).

160 HUD CHALLENGE 8, July, 1971.

161 *Id.* One of the major books of this bible says of the Minimum Property Standards, "They are intended to obtain those characteristics in a property which will assure present and continuing utility, durability and desirability as well as compliance with basic safety and health requirements. To provide this assurance, these standards set forth the minimum qualities considered necessary in the planning, construction and development of the property which is to serve as security for an insured mortgage." FHA, DHUD, MINIMUM PROPERTY STANDARDS FOR ONE AND TWO LIVING UNITS vii (1966). The Farmers Home Administration has recently adopted the MPS on an at least interim basis. *See* FmHA Bulletin, Oct., 1971, at 4413.

162 HUD CHALLENGE, *supra* note 160, at 9.

problems, so FHA developed a single nationwide standard for one- and two-living units and one for multi-family units.[163] The problem, however, is that these important property standards are rooted in "a system of mortgage insurance." The staff of the House Committee on Banking and Currency reported recently that the "FHA views itself as a mortgage insurer whose interest is in the adequacy of the security for the loan rather than decent, safe, and sanitary housing for people."[164] This influence was refined to its present overall form to serve the interests of the construction industry and federal administrators, not those of dwellers.[165]

Still another obstacle to both owner-builder and commercial construction derives from the fact that many existing local codes have not been revised for years.[166] Technical innovations in building design, ranging from plastic plumbing and strip electric wiring, to full industrialized building systems, are prohibited by many local codes. Furthermore, there is often consirable resistance to code revision.[167] While most low and moderate income owner-builders may not be especially interested in innovative designs or components, some of the less costly but most useful innovations, such as plastic pipes, are often prohibited by obsolete code restrictions.

The constraints discussed so far are faced by conventional commercial builders as well as by more innovative builders. They are also more directly related to the dwelling unit itself. However, there are other impediments which are faced by owner-builders alone. These are related to the construction process rather than the dwelling. They are a function of the attitude inherent in most codes that construction is too serious a task to be left to the dweller. Owner-builders often are required to obtain a general contractor's license before they can build, which for some people can present insurmountable difficulties.[168] More seriously, how-

163 MINIMUM PROPERTY STANDARDS, *supra* note 161.

164 *HUD Investigation Hearings* 106. The staff went on to charge that FHA had not even met this limited responsibility. *Id.* 107.

165 This point is being pressed by the large-scale Operation Breakthrough builders who have faced difficulty in designing modules acceptable in many jurisdictions. *The Problem of Codes is Holding Back the Real Breakthrough in Modular Housing,* 40 HOUSE AND HOME, Oct., 1971, at 88.

166 A. Manvel, *supra* note 147, at 3.

167 Field & Ventre, *supra* note 152, at 144-45, 149.

168 *See, e.g.,* text at note 135 *supra.*

ever, owner-builders are frequently required — as are all builders under a particular code — to use licensed subcontractors for certain tasks such as plumbing or electrical installation. Thus, owner-builders in this situation must pay for work which they can often do themselves at a lower cost.

This situation is often made more difficult by construction industry labor unions who fear loss of employment. Some critics of owner-built construction point to the scarcity of construction jobs under current conditions as a major constraint. This fear is unrealistic, however, for several reasons. Given a full federal commitment to stimulating home construction, the housing demand is so great that no construction worker should be unemployed. Skilled union men could also expand their employment possibilities by providing technical assistance to owner-builders. Finally, most owner-builders do not pose a serious threat to the unions since, given their income constraints, they simply are not in the market supplied by union labor.[169]

A Kaiser Committee technical study points out another consequence of the assumption implicit in standards that the average citizen (and particularly the owner-builder) is not competent to recognize potential dangers to health and safety.[170] No role is left, under such an assumption, for insurance purchased by the owner-builder. Moreover, this causes loss of opportunities for owner-builders to defer costs past the construction period. Code enforcement for new construction usually calls for capital expenditures in the present which might rather have been made in the future in the form of gradual improvement, expansion, or replacement. This bars many low income owner-builders from meeting their housing needs.[171]

Existing building codes also restrict the scope for rehabilitation, particularly by owner-builders (or owner-rehabilitators, in this case). This frequently leads to gradual deterioriation of the housing stock, to wholesale violations of local codes, and eventually to abandonment of dwellings — a condition attested to by many participants of the First Invitational Conference on Health Research

169 *See* text following note 76 *supra*.
170 Burns & Mittelbach, *supra* note 159, at 99.
171 *Id.* 99.

in Housing and Its Environment sponsored in 1970 by the American Public Health Association (APHA),[172] as well as by the general news media more recently.[173] The APHA conference participants recommended the adoption of building performance standards to replace outmoded product specification criteria.[174]

3. Housing Codes and Standards

Housing codes, in contrast to building codes, are concerned with the use, occupancy, and maintenance of dwellings. The purpose of housing codes is to regulate the conditions under which inhabitants occupy a dwelling, including the number of persons occupying the unit, the use of space, and facilities such as lighting, ventilating and heating equipment, elevators, entrances, and the like. "Construction controls primarily regulate how you shall build. Housing maintenance requirements regulate how you shall live."[175]

As with building codes, there is no general agreement on a consistent set of housing standards. Different agencies at different levels of government have adopted their own definitions of what constitutes "standard" and "sub-standard" housing, none of which have proven to be particularly satisfactory.[176] There is also a lack of consensus on whether a single coherent set of housing standards would be preferable to the existing collection of disparate statutes.

Notwithstanding the wide differences between local housing standards, and between the latter and the various federal and state

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172 ENVIRONMENTAL HEALTH SERVICE, PUBLIC HEALTH SERVICE, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, PROCEEDINGS OF THE FIRST INVITATIONAL CONFERENCE ON HEALTH RESEARCH IN HOUSING AND ITS ENVIRONMENT (1970) [hereinafter cited as PROCEEDINGS].

173 *See* note 17 *supra.*

174 *See* PROCEEDINGS, *supra* note 172, at 30-32. This is a key distinction in the analysis of codes as they constrain owner-builders, and must be a priority item in future research. For a general but excellent beginning, see NATIONAL BUREAU OF STANDARDS, U.S. DEP'T OF COMMERCE, THE PERFORMANCE CONCEPT: A STUDY OF ITS APPLICATION TO HOUSING (1968). *See also* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM 35-37 (1966); and Wright, *Performance Criteria in Building,* 224 SCIENTIFIC AMERICAN 17 (1971).

175 F. GRAD, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 3 (National Commission on Urban Problems Research Report No. 14, 1968).

176 *See* Sutermeister, *Inadequacies and Inconsistencies in the Definition of Substandard Housing,* in HOUSING CODE STANDARDS: THREE CRITICAL STUDIES (National Commission on Urban Problems Research Report No. 19, 1968).

standards, there is nevertheless some agreement on acceptable minima. The HUD-FHA Minimum Property Standards represent an extremely influential indicator of the approximate housing standard threshold subscribed to by government and private industry alike. Unfortunately, however, it remains a fact that

> many hundreds of thousands of United States households cannot afford to pay the cost of living in miminum-quality dwelling units, as defined by existing housing and building codes. Their poverty conflicts with the legal standards defined by those codes, because the latter are based on what is desirable for everyone, rather than what is attainable for everyone.[177]

In particular, space requirements and standards of "amenities" result in increased housing costs to the occupant. This is especially regrettable when it applies to owner-builders, who might otherwise provide themselves with acceptable housing at lower cost to themselves and to the public. Furthermore, as Banfield and Grodzins have pointed out, it is arguable that minimum housing standards are not justifiable except where there would otherwise be an obvious threat to the community, and that "[t]o require the consumer to buy more housing or related facilities than he wants is both an infringement of his liberty and a mal-allocation of resources."[178] Another commentator goes further:

> What is essential should not be confused with what the middle class finds desirable. This appears to be a recurrent trouble as codes are expanded and escalated to a point inconsistent with the freedom generally associated with American democratic ideals.[179]

Behind the persistent refusal of public authorities to accept the fact that standards are beyond the reach of a large proportion of

177 A. Downs, *Home Ownership and American Free Enterprise,* in URBAN PROBLEMS AND PROSPECTS 162 (A. Downs, ed. 1970).

178 GOVERNMENT AND HOUSING IN METROPOLITAN AREAS 79 (1958).

179 S. PARRATT, HOUSING CODE ADMINISTRATION AND ENFORCEMENT 21 (Community Environmental Management Series, Dep't of HEW 1970). The author illustrates his point by referring to a recently enacted Milwaukee regulation that lawns must be cut and cared for, and by citing a section from the Madison, Wisconsin, Housing and Property Maintenance Code (Ord. No. 1857, ch. 27, § 27.05 (1965)) which lists among the maintenance duties of the owner, "[l]andscaping, planting and other decorative surface treatments . . . if necessary and . . . an attractive appearance in all court and yard areas . . . so as to enhance the appearance and value of the neighborhood and city." *Id.*

our population, there appears to be a deep-seated refusal to recognize that family housing needs vary widely over time and from household to household; and, significantly, that owner-builders are able to meet their own housing needs when given the freedom to do so.

Anthony Downs argues persuasively for the adoption of "lower-than-optimal" housing quality standards on the grounds that it is socially and economically better to provide many improved but very modest units than to build a few high quality units.[180] The alternative is to provide for greater direct subsidies to low- and moderate-income families than have been considered by policy makers.[181] The latter possibility is unlikely; the former is what commonly occurs for the bulk of the world's population. Implicit in the idea of lower-than-optimal standards is the concept of incremental housing improvement, which accepts the variability of dweller needs and resources and further recognizes that the uses to which housing is put will likewise change with time. With this in mind, the 1970 APHA conference made three significant recommendations for policy changes:

> 20. Building, housing and planning codes and code administration should recognize and support the changes of use and quality which occur to change the value of dwellings and local environments during their existence.
> 21. This is a recommendation that *building and housing codes and code administrations must be modified, where necessary, in order to enable owner-builders to construct standard houses incrementally*. Each increment, however, should be of code standards for its design purpose. [emphasis added]
> 22. Code administration for older houses must enable owners or occupiers to make the improvements to below standard and at levels which they can afford when correction of all violations is financially unfeasible.[182]

Indeed, there is no reason why a family which is unable to pay the total cost of a new "standard" dwelling would not be able to occupy it once it has become habitable, and gradually improve

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180 *Housing the Urban Poor: The Economics of Various Strategies*, 59 AM. ECON. REV. 649-57 (1969).

181 Downs, *supra* note 177, at 162-64.

182 PROCEEDINGS, *supra* note 172, at 31-32.

the house until it becomes "standard." Similarly, a low or moderate income family ought to be able to move into a deteriorating, but structurally sound dwelling and rehabilitate it to suit its needs and resources. A highly successful program in Rochester, New York, has recently facilitated this process.[183] Putting both approaches together results in a more efficient use of housing resources by extending the useful life span of a given structure. Owner-builder inputs to this process lower costs to the point where low income families can afford modest, though greatly improved, housing, while reducing the required level of public subsidy.[184]

This overview of some of the constraints on the owner-building process found in zoning practices, building codes, and housing codes is meant to state the scope of the problem rather than to suggest concrete solutions. Some directions of change have been indicated. The criticisms made are not based on a premise that standards and codes should be eliminated for the sake of the owner-builder. Further research is necessary before policy decisions can be made and alternatives chosen which will accomodate the various conflicting interests, and release the energies and resources inherent in the owner-building technique. Decisions should be made with a view toward not only housing production and "community welfare," but also the enhancement of individual self-determination.

III. Proposed: A Housing Advisory Service

The above might suggest that the owner-builder is walking a minefield of problems. He gets very little direct help from any official governmental sources, and established legal requirements

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183 *See* R. Goetze, Conserving the Urban Housing Stock 156-209 (June, 1970) (unpublished doctoral thesis in the Massachusetts Institute of Technology Library).

184 In addition to the constraints developed in this section — legislative, administrative, zoning practice, and code — attention should also be paid to the problems the owner-builder faces with the practices of private financing institutions. Among the problems are interim financing, which is usually given for a one-year period only, the first installment typically being made available only after the foundation has been constructed, construction loans which often are given only to commercial contractors and not to lay builders, and the practice many insurance companies have of insuring only licensed builders.

seem designed to frustrate his task. While the legislative and administrative considerations occur at the state or federal level, zoning regulations and codes are largely local matters, except perhaps where a statewide code is applicable. Amelioration of the owner-builder's situation cannot be accomplished by federal or even state action alone. However, the federal and state governments can both supply information and facilitate the owner-building process itself.

The Housing Advisory Service proposed below will not solve, either in the short or the long run, all the problems facing owner-builders. Given the fact that a significant number of people currently engage in owner-building in spite of the problems discussed, however, it is expected that an easing of these problems and the provision of broad technical and financial assistance to owner-builders will result in increased use of this method of meeting "the housing crisis."

A. *The Network*

The owner-builder is necessarily situated in a network of resources upon which he draws. To the extent they are available, these resources will include individuals, businesses, and various institutions. Materials and equipment suppliers are part of the network, as are sources of labor, who may include a general contractor, subcontractors, hired professionals, experienced friends, or friends with little more than energy and good will. A housing module or component manufacturer may be accessible. Credit and finance sources will most likely be part of the network, be they banks, savings and loan institutions, credit unions, friends, or government programs. The owner-builder may also wish to consult an architect, surveyor, lawyer, engineer, land broker, or technical advisor on any number of matters. These latter are often already members of the network. It seems that the most fruitful source of aid is often other owner-builders. The owner-builder will be in contact informally or officially with a range of public officials. The obstacles discussed earlier are by definition aspects of the network within which the owner-builder moves toward his goal.

The network constitutes both opportunity and constraint. It exists independently of the owner-builder and will provide services

for him in accordance with the experience it has had with owner-builders in the past. A variety of other factors will also color this response, many of which should be clear from the earlier discussion, not the least of which are race and income. The network is necessarily a local phenomenon, and can be either formal or informal, often depending on the population size and community cohesion and interaction patterns. It will be as diversified, option-laden, and sophisticated as the community it serves.

The important aspect of the owner-builder network is that it offers to an individual situated within it the opportunity to exercise a great degree of control over his own housing. Through utilization and manipulation of the network, his housing becomes not just an alternative offered to him as one of a very limited number of options determined by uncontrolled forces, but rather a process into which he enters as the determinant force. The owner-builder is free to combine the services and goods of the network as his own desires and resources permit. The network provides many different ways of achieving the desired end, satisfactory shelter, which otherwise is either unavailable or presented as given, and not subject to personal choice. The wealthy can secure the same ends through custom-built houses. Yet to the extent the wealthy are dependent upon professionals, they forego a degree of autonomy and personal achievement. For them, however, it is a matter of choice. The low income owner-builder realizes a high degree of autonomy often out of sheer necessity and lack of options. But the owner-building method ought to be a genuine alternative available to the entire range of seekers of shelter, not a matter solely of want or luxury.

B. *The Housing Advisory Service*

Information is the most critical variable in the owner-builder process and is clearly the key to the network. At present adequate information is largely dependent on chance and the determination of potential owner-builders. No institution presently exists by which such information, or technical and financial assistance, could be made readily available to them. A Housing Advisory Service to provide that information and assistance is proposed. This proposal is profoundly conservative because it maintains and

expands an existing system. Yet this system is a radical departure from most proposals because it is oriented towards the dweller, or demand side of the market. It also differs from the housing allowance approach, which, although it might open more housing choices to people, creates choices which are supplier-defined and supplier-determined, and which might have the effect on housing costs which Medicare has had on medical costs. In short the proposal severs the present symbiotic relationship between the government and producers-for-profit, emphasizing instead the joining of demand and supply-production functions by means of minimal government intervention.

There have been some attempts to deal with the informational needs of owner-builders. In Melbourne, Australia, for example, the Royal Australian Institute of Architects has operated the Architects' Housing Service since 1946. During the 1949-51 Australian building boom, it was responsible for more than 12 percent of the homes built. For $50 the Service provides architectural consultations from member firms, construction advice, and inexpensive plans, which are constantly up-graded through architectural competitions sponsored by the Gas and Fuel Corporation of Victoria.[185]

In this country, Community Design Centers (CDC) have been established in sixty-five cities, to make architectural, engineering, and planning services available to inner-city, low income people who otherwise could not afford them.[186] The first of the CDC's was the Architects Renewal Committee for Harlem (ARCH) established in 1964 and still operating.[187] Another CDC is operated in Philadelphia by the Architects Workshop, which has been funded by DHUD with its "701" planning funds.[188] The Community Services Department of the American Institute of Architects serves as a clearinghouse of information for CDC's around the country. In Detroit, a branch of the building department gives advice to "do-it-yourselfers,"[189] and in Milwaukee there is a Housing Clinic

185 Letter from Mr. Graham Whitford, Director, Nov. 30, 1971. The Service works closely with The Age, a Melbourne newspaper, in advertising and disseminating information.

186 American Institute of Architects, CDC Listings (1971).

187 Architects Workshop, A Primer for Community Design Centers 4 (1971).

188 *Id.*, frontspiece.

189 S. Parratt, *supra* note 179, at 54.

which offers advice and design and plan assistance to homeowners on needed repairs and help in selecting contractors.[190] In San Francisco, the Federally Assisted Code Enforcement (FACE) program supplies architects and architectural students for similar assistance.[191] While none of these programs, with the exception of the Australian one, provides comprehensive services to the individual owner-builder, they are suggestive of the proposal made here.

A Housing Advisory Service (HAS) is proposed, a program either state or federally funded, which would operate in designated areas providing free advice and technical assistance to potential owner-builders. Local offices would help owner-builders manipulate the owner-builder network as well as external sources of finance, and provide advice and technical assistance during the construction phase itself. This would establish a formal institution to assist owner-builders, especially in the more difficult activities. It would help them decide what they should do themselves and what to leave for subcontractors. It would advise them of the available options and the criteria for choosing among the alternatives. The HAS office could be the focal point for owner-builder interests in a given area, and all possible members of the network would be familiarized with it, so that an owner-builder who plugged into the network at some point other than the HAS office might be made aware of its services. The HAS office itself would of course be a key part of the network. In short the HAS would help owner-builders get the most out of themselves and the network, aiding them in realizing the housing alternative which best meets their needs and resources.

The staff of a local HAS would be chosen because of their familiarity with the techniques of owner-building and the local network, and their capacity for assisting low- and moderate-income families. In addition to counseling owner-builders and facilitating the operation of the network, a major task of the HAS, at both local and federal levels, would be to work toward the elimination of as many of the obstacles discussed above as possible. These

190 *Low-Income Housing Ideas Tested by Section 207 Grants*, 21 J. HOUSING 407, 408 (1964).

191 *Architects Give Free Services in Code Area*, 24 J. HOUSING 571 (1967).

obstacles to owner-building are not necessarily part of an integrated conspiracy. Yet the owner-builder does face a complex of public and private special interests, jurisdictional jealousies, bureaucratic inertia and apathy. Mere awareness of the problems will not lead to the significant institutional and legal changes required to release the potential of owner-building without a more concerted effort.

The first HAS's should be established as prototypes — instruments not only to carry out the projected tasks, but also to test the concept and to gauge the environment in which they are to operate. A preliminary step to establishment of the pilot HAS's would therefore be programmatic planning and administrative designations, especially the probing, analysis, and selection of appropriate network areas, and the design of program monitoring and evaluation instruments. During the pilot phase, the front office should conduct a comprehensive market survey and analysis to measure the potential for owner-building within its jurisdiction. During the planning phase it should be decided whether the HAS field operations are to be carried out as official public functions or as publicly funded non-profit organizations.

The HAS would be authorized to receive advance commitments of interest subsidy reservations under appropriate programs. A federal revolving performance insurance fund would be established, as a support to the federal HAS, to assure lenders that the units will be completed. Costs for the insurance could be recovered by inclusion in the mortgage.

At the federal level, the recommended legislation would place the HAS operation under the Department of Agriculture's Farmers Home Administration. As noted earlier, 70 percent of the owner-builder homes are outside of SMSA's,[192] and FmHA is already involved in mutual and self-help housing under the 1968 HUD Act, although only on an organized group basis.[193] In addition, the 1970 Census showed that 61 percent of the occupied substandard housing is located in non-SMSA areas.[194] If the HAS approach proves successful, then perhaps further legislation would

192 *See* text at note 77 *supra.*
193 *See* text at note 69 *supra.*
194 Letter from Mr. Clay L. Cochran, Nov. 16, 1971.

be warranted to grant DHUD authority to initiate it within the urban areas, if at that time the bifurcation of responsibility for housing between DHUD and the Department of Agriculture has not yet been resolved. To cover a wider potential target population, and to close the current population operating gap between FmHA and FHA,[195] it is suggested that the FmHA population limitation be raised to 25,000.[196] In addition, to reiterate, authority for section 235 assistance payments should be given to the Secretary of Agriculture, and the HAS offices should be allowed to contract for them.

C. *Precedents*

Although this proposal is radically different from the major federal housing assistance programs, there are nevertheless some precedents for it in the existing statutory corpus. The umbrella endorsement of self-help in connection with section 235,[197] the congressional intent manifested in section 106,[198] and the operating FmHA 523 program[199] have all been discussed. In addition, there is section 506 of the Housing Act of 1949,[200] which allows the Secretary of Agriculture to carry out research in new housing materials and construction methods.[201] Moreover,

> [i]n addition to the financial assistance authorized in this title [which includes the 502, 504, and 523 programs] the Secretary is authorized to furnish, through such agencies as he may determine, to any person, including a person eligible for financial assistance under this title, without charge or at such charges as the Secretary may determine, technical services such as building plans, specifications, construction supervision and inspection, and advice and information regarding farm dwellings and other buildings.[202]

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195 *See* text at note 109 *supra.*

196 This has been suggested by, among others, The National Housing Conference, *see 1971 Resolutions,* 117 CONG. REC. E3108 (daily ed. Apr. 4, 1971) (extension of remarks of Senator Humphrey), and THE NATIONAL RURAL HOUSING COALITION, PEOPLE HAVE A RIGHT TO DECENT HOUSING, 1971 RESOLUTIONS 12-13 (1971).

197 *See* text at note 98 *supra.*

198 *See* text at note 62 *supra.*

199 *See* text at note 69 *supra.*

200 42 U.S.C. § 1476 (1970).

201 *Id.* § 1476(b).

202 *Id.* § 1476(a).

"Farm dwellings" would cover houses being constructed by owner-builders.[203] It seems arguable, therefore, that the Secretary has the authority to set up an HAS system under these provisions. Farmers have long received the assistance authorized, but individual owner-builders, especially of low incomes, have not fared as well. The discretion lodged with the local agents as well as their heavy work loads have permitted this to occur. It is unlikely that anything short of legislative mandate will break up the pattern.

The proposed federal legislation could easily be adapted for use by states, within the peculiar parameters of each state's existing housing effort, if indeed any effort exists. While the great balance of housing programs have been instituted or paid for at the federal and local level,[204] a number of states have increased activity in recent years in the areas of public housing, mortgage financing and research. If federal revenue sharing is implemented at a significant level, this activity is likely to increase. There are several states with legislative provisions under which an HAS might arguably be initiated, or at least which open the door for discussion and supplemental authorizing legislation.

The Maine State Housing Authority is authorized to serve as a clearinghouse for housing information; to conduct research and demonstration model housing programs dealing with, among other things, planning, types of building design, and techniques of construction; to provide or coordinate technical assistance and consultation about housing to individuals; to prepare, publish, and disseminate educational materials dealing with housing matters; and to encourage and coordinate effective use of resources and services for housing.[205] These powers could easily form the legislative base for an HAS program. The West Virginia Housing Development Fund is involved in both planning and housing production and has been described as "a particularly effective and broad-gauged instrument."[206] While concerned mostly with projects and sponsors, nevertheless the Fund is backed by legislative authority which would permit research into, and demonstration

203 42 U.S.C. § 1471(b) (1971).

204 Martin, *Housing and Community Development*, THE BOOK OF THE STATES 1970-1971 444 (1970).

205 30 ME. REV. STAT. ANN. tit. 30, § 4601-A (Supp. 1970).

206 Schechter & Schlefer, in PAPERS 84.

of, such a program of technical assistance as is proposed herein.[207] Missouri's new State Housing Development Commission has very similar authority,[208] as does the Illinois Housing Development Authority.[209] Michigan's State Housing Development Authority also has powers to engage in relevant research and demonstration projects.[210] In its provisions for use of the state mortgage assistance plan, the legislation provides that an owner who constructed his house himself be allowed to use his labor to add "sweat equity" to his interest in the house.[211] North Carolina's Low-Income Housing Development Corporation has been involved since 1967 in an OEO-financed program of technical and financial assistance to nonprofit sponsors of housing;[212] the new North Carolina Housing Corporation and Housing Development Fund might be used to provide loans to low-income families, with closing cost funds for construction loans not federally insured.[213] Other states, including New York,[214] New Jersey,[215] Delaware,[216] Pennsylvania,[217] Alaska,[218] and Vermont[219] have programs of financial assistance which might arguably be made available to owner-builders, concerning which a local HAS might provide advice and assistance.

IV. Legislative Draft

The draft that follows does not deal with many of the obstacles to owner-building discussed in this paper. It provides for implementation of the Housing Advisory Service, which will work at both field and head office levels for the elimination of the myriad legal and institutional road blocks, whether statutory, organizational, or systemic. Perhaps the most critical areas of reform are

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207 W. Va. Code Ann. §§ 31-18-6(22), (23), (24) (1971).
208 Mo. Ann. Stat. §§ 215.030(23), (24) (Supp. 1971).
209 Ill. Ann. Stat. ch. 67½, § 307.5 (Smith-Hurd Supp. 1971).
210 Mich. Comp. Laws Ann. § 125.1422(h) (Supp. 1971).
211 *Id.* §§ 125.1444(2)(e), (f).
212 Schecter & Schlefer, in Papers 83-84.
213 N.C. Gen. Stat. § 122A-7 (Supp. 1971).
214 N.Y. Priv. Hous. Fin. Law §§ 41-44 (McKinney Supp. 1971).
215 N.J. Stat. Ann § 55:14J (Supp. 1971).
216 Del. Code Ann. tit. 31, § 4066(b)(1) (Supp. 1970).
217 Pa. Stat. Ann. tit. 35, §§ 1664(d), 1680 (Supp. 1970).
218 Alaska Stat. § 18.56.090 (Supp. 1971).
219 Vt. Stat. Ann. tit. 24, § 4004a (Supp. 1971).

official codes and standards, and financing. Clearly the advocacy role assigned to the HAS in this regard must be aimed not only at officially sanctioned and established obstacles, but also at commercial markets and at popular attitudes and myths. Not the least of these is that people cannot build their own homes.

A STATUTE TO PROVIDE FOR A FEDERAL HOUSING ADVISORY SERVICE

Section 1. *Title*

This act shall be known and may be cited as the Housing Advisory Service Act of 197—.

Section 2. *Declaration of Policy*

The Congress reaffirms the national goal of a "decent home and a suitable living environment for every American family." The Congress finds that this goal has not been fully realized for many of the Nation's families; that this is a matter of grave national concern; and that there exist in the public and private sectors of the economy the resources and capabilities necessary to the full realization of this goal.

The Congress reaffirms its policy, stated in the Housing and Urban Development Act of 1968, that in the carrying out of housing programs for low income families "there should be the fullest practicable utilization of the resources and capabilities of private enterprise and of individual self-help techniques." The Congress declares that this policy should be extended to all housing programs.

The Congress finds that a significant number of low- and moderate-income families are capable and desirous of building their own homes in whole or in part, with considerable savings to themselves and benefits to the public, and declares that understakings of this nature should be encouraged and fostered to the greatest extent practicable.

COMMENT: The language herein reiterates earlier policy pronouncements regarding housing goals and the emphasis Congress intended to be placed on self-help techniques.[220] Specific notice is taken of owner-building, and the Congress declares that the method should be supported.

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220 12 U.S.C. § 1701t (1970).

Section 3. *Definitions*

(a) As used in this title, the term "owner-builder" means any non-corporate person who acts independently and without the aid of a formally established mutual-help group program, as the general contractor for, or provides part or all of the labor necessary to build, his own dwelling.

(b) "Owner-building" is the process engaged in by owner-builders in the construction of their dwellings.

COMMENT: The definitions closely follow that of the Bureau of the Census,[221] with the qualification distinguishing the "owner-builder" from the participant in a mutual self-help program.

Section 4. *Existing Programs*

In the administration of the programs authorized by sections 235, 237, 203, and 106 and other relevant sections of the National Housing Act, the Secretary of Housing and Urban Development shall to the greatest extent practicable make available to owner-builders the full assistance and benefits of these programs. The Secretary of Agriculture shall do likewise in the administration of the programs authorized by sections 502, 503, 504, 506, 523, 524, and other relevant sections of the Housing Act of 1949. To this end, both Secretaries shall conduct a thorough review of existing regulations, procedures, and practices to uncover and eliminate all obstacles to the realization by owner-builders of such assistance and benefits.

COMMENT: A specific congressional directive is made to the Secretaries to make available to owner-builders the benefits of the housing assistance programs which they respectively administer. Full reviews of the programs are to be made with this goal in mind.

Section 5. *Reform of Existing Obstacles*

The Secretary of the Department of Housing and Urban Development and the Secretary of the Department of Agriculture shall initiate a joint review and study of the existing obstacles to owner-building found in local building and housing codes and standards, property taxation provisions, zoning practices, commercial financing and insurance practices, housing materials supply practices, housing industry labor union practices, and in such other related areas as each Secretary

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221 *See* BUREAU OF THE CENSUS, DEP'T OF COMMERCE/DHUD, CONSTRUCTION REPORTS, C-25 SERIES, ONE-FAMILY HOMES, 1968 104 (1969).

shall deem appropriate. Upon the results of these studies they shall make recommendations for reforms which would facilitate the owner-building process. Such recommendations shall be made known to the Congress not later than one year after the date of enactment of this Act.

COMMENT: The Secretaries are to conduct a joint study of the myriad obstacles to owner-building which now exist at all levels of governmental regulations and in the private sector. This investigation and analysis should provide the groundwork for the HAS' performing its informational and educational roles as well as its advocacy and facilitating roles. Recommendations are also to be made to the Congress, which should relate not only to federal action, but should also include suggestions for state, local, and private action and reform.

Section 6. *Owner-Builders and The Housing Advisory Service*

Section 523(a) of the Housing Act of 1949 is amended as follows:

(a) by changing the period at the end of subsection (2) to a comma and adding a new subsection as follows: "and (3) to make financial and technical assistance available on reasonable terms and conditions in rural areas and small towns to individuals and families who meet the requirements of section 501 of this Act and who are owner-builders or prospective owner-builders, such assistance to be provided through a Housing Advisory Service as herein established."

(b) by changing subsection (b)(2) to subsection (b)(3), and by adding the following new subsection (b)(2):

> **(2) to establish a Housing Advisory Service to facilitate the process of owner-building. This Service shall operate in such localities as the Secretary shall deem appropriate, on the basis of present and potential owner-building activity. The responsibilities of the Housing Advisory Service shall include:**
>
> **(A) at the national level, to engage in research regarding, to disseminate information on, and to actively promote the method and techniques of owner-building; to seek the elimination of obstacles to owner-building, from whatever source; and to provide such supportive services to the field offices of the Service as the Secretary shall deem appropriate and necessary;**
>
> **(B) at the local level, to provide to owner-builders and to potential owner-builders information, advice, and technical**

assistance regarding construction materials, costs, and methods, and the availability and identity of local sources and resources; regarding financing opportunities and requirements, site acquisition, construction performance insurance, legal requirements and constraints, other available housing alternatives, and all other assistance as shall be deemed useful to facilitating the process of owner-building in the locality to foster the approach. The Housing Advisory Service is authorized to receive applications for and make commitments on behalf of the Secretary regarding financial assistance available under this section and title, and under section 235 of the National Housing Act.

(c) by adding the following sentence to new subsection (b)(3): "Such loans shall be available to owner-builders receiving assistance from a Housing Advisory Service, subject to the same limitations."

(d) by deleting the "or" and adding a comma between "(1)" and "(2)" of subsection (c) and adding ", or (3)" after "(2)."

(e) by changing subsection (f) to (g) and subsection (g) to (h) and by adding the following new subsection (f):

(f) There is hereby created an Owner-Builder Performance Insurance Fund (hereinafter referred to as the Fund) which shall be used by the Secretary as a revolving fund for carrying out all the mortgage insurance obligations incurred under this section. There is hereby authorized to be appropriated to the Secretary such sums as may be necessary for the purposes of the Fund. Premium charges, adjusted premium charges, and other fees and service charges received on account of any mortgage or loan which is the obligation of the Fund, the receipts derived from the property covered by such mortgages and loans and from the claims, debts, contracts, property, and security assigned to the Secretary in connection therewith, and all earnings on the assets of the Fund shall be credited to the Fund. All payments made pursuant to claims of mortgagees with respect to mortgages insured under this section, cash adjustments, the principal of and interest paid on debentures which are the obligation of the fund, expenses incurred in connection with or as a consequence of the acquisition and disposal of property acquired under this section, and all administrative expenses in connection with the mortgage insurance operations under this section shall be paid out of the Fund. There is au-

thorized to be appropriated such sums as may be needed from time to time to cover losses sustained by the Fund in carrying out its obligations. Moneys in the Fund not needed for current operations of the Fund shall be deposited with the Treasurer of the United States to the credit of the Fund or invested in bonds or other obligations guaranteed by the United States. The Secretary, with the approval of the Secretary of the Treasury, may purchase in the open market debentures which are the obligation of the Fund. Such purchases shall be made at a price which will provide an investment yield of not less than the yield obtained from other investments authorized by this section. Debentures so purchased shall be cancelled and not reissued.

(g) by amending new subsection 523(g) by changing "$5,000,000" to "$20,000,000," and by changing "July 1, 1973" to "July 1, 1977," and by changing "June 30, 1973" to "June 30, 1977."

COMMENT: This is the heart of the bill, adding the owner-builder concept to and establishing the Housing Advisory Service within the existing self-help provisions of the Department of Agriculture housing legislation, specifically within section 523 of the Housing Act of 1949.[222] Owner-builders who fit within the requirements of eligibility for FmHA housing assistance, basically those of low and moderate income in rural areas,[223] are to be assisted both financially and technically, through the instrumentality of the Housing Advisory Service. At the national and local levels the HAS is to disseminate information about, advocate, and facilitate the owner-building method. Facilitating owner-building occurs especially at the local level. It involves helping the owner-builder use the network of resources available, including financial assistance from the federal government, and providing technical assistance in the actual building process.

The performance insurance fund is modeled on the Special Risk Fund set up for certain DHUD housing programs.[224] The insurance of mortgages should ensure that the HAS will provide quality technical assistance, and this fund provides the support that should

222 42 U.S.C. § 1490(c) (1970).
223 *See* 42 U.S.C. § 1471 (1970).
224 12 U.S.C. § 1715z-3(b) (1970).

make financial institutions more willing to deal with owner-builders.

The increase in authorized funding is to cover the substantial increase in activity foreseen by the initiation of the Housing Advisory Service. This is a very tentative figure which should be more carefully calculated before final consideration of this bill.

Section 7. *Population Limit*

Section 520 of the Housing Act of 1949 is amended by changing "10,000" to "25,000."

COMMENT: The population increase is to cover the current gap between the areas in which FHA offices actually operate, and the current statutory limit on FmHA jurisdiction. This change and figure has been advocated already.[225]

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225 *See* note 196 *supra.*

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NOTES

THE XYY CHROMOSOMAL ABNORMALITY: USE AND MISUSE IN THE LEGAL PROCESS

Introduction

Even before the recent rapid rise in crime, people sought an easy and yet acceptable means to predict and thus to prevent socially deviant behavior.[1] Initial efforts sought to isolate deviants through the development of reliable, objective standards and tests. These early efforts were largely retrospective and were directed at known criminal populations which were examined from a variety of clinical viewpoints so as to deduce common characteristics which might lead to a predictive model.[2] Significant among the early efforts were those of Lombroso and Garofolo[3] who claimed to have discovered a set of common physical traits among criminals (lobeless ears, receding chins, low foreheads). Their approach was superseded by the more sophisticated analytical modes of the Gluecks who claimed to have developed a tripartite set of determinants of delinquent behavior.[4] None of these early efforts established reliable, objective standards for prediction.[5]

Since 1960, geneticists and physicians have been studying the occurrence and effects of extra sex-determining chromosomes in humans. The first published report of a man with an extra Y, or male-determining chromosome (47,XYY), was released in August, 1961.[6] This individual was of average intelligence, without any physical defects, and had no criminal record. His chromosomes were studied to learn more about the presence of mongolism and other anomalies among his children.

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1 In this context, socially deviant behavior is that behavior which is outside the bounds of acceptability of a particular society as defined by its statutes and common law.

2 *See* A. Rosenberg & L. Dunn, *Genetics and Criminal Responsibility*, 56 MASS. L.Q. 413 (1971).

3 *See generally* C. LOMBROSO, CRIME, ITS CAUSE AND REMEDIES (1918); F. ALLEN, RAFFAELO GAROFOLO: PIONEER IN CRIMINOLOGY 254-76 (1960).

4 *See* S. GLEUCK & E. GLEUCK, PHYSIQUE AND DELINQUENCY (1956).

5 *See* A. Rosenberg & L. Dunn, *supra* note 2.

6 Sandberg, Koepf, Ishihara & Hauschka, *An XYY Human Male*, 2 Lancet 488-89 (1961).

Several years after the discovery of the extra Y chromosome, unexplainable aggressive behavior was blindly attributed to the chromosome. It was argued that the presence of an extra Y chromosome in the genetic make-up of a male gives him a double dose of maleness making him aggressive and predisposing him to violent acts.[7]

If this argument is correct, it raises the following questions. Should we screen the general population for the extra Y chromosome and commit those with the anomaly; permit defendants to plead insanity based on their chromosome anomaly; or ignore the anomaly? This Note will consider the most recent XYY medical data as it relates to deviant behavior. Then, in light of these data, the Note will consider the role of the XYY chromosome in the legal process.

I. Genetic Explanation

The double Y complement is produced most probably during formation of the sperm. During the process of meiosis, in which chromosomes divide and duplicate themselves, normal separation of the sex chromosomes leads to two kinds of sperm — those with an X chromosome and those with a Y chromosome. If an X sperm fertilizes a normal X ovum, an XX individual (normal female) will result. If the Y sperm fertilizes the ovum, a normal XY male will result.

Two divisions occur during meiosis. If the sex chromosomes fail to separate normally during the first meiotic division in the production of sperm, two kinds of sperm cells are formed — those with both the X and Y chromosomes and those with no sex chromosomes. If an XY sperm fertilizes a normal ovum, an XXY individual will be the result. The XXY individual is a male (Klinefelter's syndrome)[8] but is usually sterile, lacking functional testes.

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7 National Institute of Mental Health (NIMH), Report on the XYY Chromosomal Abnormality 3,14 (1970) [hereinafter cited as NIMH Report]. The NIMH held a two-day conference on the XYY chromosome anomaly, sponsored by the Center for Studies of Crime and Delinquency in June, 1969. A report was published in October, 1970, which surveyed the more recent reports in the scientific literature, updating the information on the XYY anomaly.

8 "Klinefelter's syndrome": males with late onset of puberty, underdeveloped testes, possible breast development, increased frequency of mental retardation, and also believed to be more vulnerable to social and psychological problems.

If a failure of the sex chromosomes to separate occurs at the second meiotic division of the paternal germ cells, three types of sperm are produced: XX, YY, and those containing no sex chromosomes. Offispring resulting from fertilization of a normal ovum will be respectively, XXX, XYY, and XO.

An XYY individual also could be produced if the sex chromosomes fail to separate normally in the early stages of division of a normal, fertilized XY ovum. However, in such an event, an individual with some type of mosaicism is more likely to result. Mosaicism is the condition in which a different number of sex chromosomes exist in different tissue or parts of the body. For example, an individual may have only one X chromosome in some of his cells and three chromosomes (XYY) in other cells. Such mosaics would be designated XO/XYY. If the single X chromosome is coupled with an isochromosome (I) — a chromosome with two identical arms — then the mosaic would be XI/XYY. Of course, other mosaics occur such as XY/XYY or XYY/XYYX.[9]

II. Early Research and Publicity

With this genetic information at their disposal, researchers began the bulk of their work after the August, 1961, published report. In most of the research, individuals chosen for study had some mental or physical abnormality. Researchers went to hospitals and prisons. It was in the results of the studies done in those institutions that the existence of the newly discovered XYY syndrome was confirmed.[10] Once the new chromosome discovery was confirmed, other studies were made to document its incidence and prevalence[11] and its distinguishing characteristics, if any.

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9 *See* Montagu, *Chromosomes and Crime*, 2 Psychology Today 43 (1968).

10 *See generally* Casey, Blank, Street, Segall, MacDougall, McGrath & Skinner, *YY Chromosomes and Antisocial Behavior*, 2 Lancet 859-60 (1966); Jacobs, Brunton, Melville, Brittain & McClemont, *Aggressive Behavior, Mental Sub-Normality, and the XYY Male*, 208 Nature 1351-52 (1965).

11 "Incidence" is defined as the rate at which *new* cases of a condition are added to a given population during a certain period of time or in relation to a particular event. More specifically, as related to the XYY condition or other genetic abnormalities, incidence is the rate of occurrence observed or estimated to exist in a given population at birth.

"Prevalence" is defined as the total number of cases of a condition that can be counted or estimated in all age groups in a given population at a particular point in time.

In one of the earliest of these studies, Casey found a relatively higher frequency of males with an extra Y chromosome among a patient population requiring special security because of persistent violent or aggressive behavior[12] than among newborns and inmates of hospitals for the mentally subnormal.[13] Moreover, the XYY individuals were significantly taller than their peers.[14]

Both the medical and legal fields undertook serious investigation of the XYY anomaly as of 1965 when Jacobs proposed to study inmates of Western General Hospital in Edinburgh, Scotland, housing dangerous and violent criminals, to determine if an extra Y chromosome predisposed its carriers to unusually aggressive behavior.[15] The study confirmed the presence of the XYY syndrome in a statistically significant sample of strict security inmates who also all happened to be abnormally tall.[16]

Numerous studies followed on chromosomal patterns among tall males institutionalized for mental illness, mental subnormality, or various forms of criminal behavior. The number of persons found to have the extra Y chromosome markedly exceeded the prevalence of the XYY pattern roughly estimated for the general population. This led some researchers to conclude that the extra Y chromosome predisposed such males to violent and aggressive behavior while others disagreed, citing the biased samples and lack of data on general populations.[17]

The general public became cognizant of the XYY anomaly and its research in 1968 through publicity given to a series of murder cases in which the defense claimed some form of diminished responsibility due to the extra Y chromosome of the defendant. In the Paris case of Daniel Hugon, the defense claimed Hugon had an extra Y chromosome and thus was not criminally responsible

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12 *See* Casey, *supra* note 10, at 859.

13 *See* Jacobs, *supra* note 10, at 1351.

14 *See* Casey, *supra* note 10, at 860.

15 *See* Jacobs, *supra* note 10, at 1351.

16 The findings showed 12 of the 197 patients examined had a chromosomal anomaly and eight of the 12 had an extra Y chromosome. This finding was significant since a frequency of 3.5 percent is a marked increase by comparison to the frequency of XYY males at birth. It was supported by the further finding that no XYY individuals were found in 209 randomly selected adult males and none in 266 randomly selected male newborns, and only one XYY was found in a group of 1,500 males examined for various reasons.

17 NIMH Report, *supra* note 7, at 3.

for his behavior. The court appointed an expert panel to review the mental condition of the defendant. After trial and conviction, a reduced sentence was imposed, *presumably* because of the chromosome defect.[18]

At approximately the same time, Lawrence E. Hannell was acquitted of murder in Melbourne, Australia, by reason of insanity. This verdict was supposedly influenced by testimony concerning his XYY constitution.[19] Richard Speck, murderer of the eight Chicago nurses, was also said to be an XYY.[20]

Although much of the public accepted the proposition that XYY males are destined for violent and antisocial behavior, others felt this conclusion permature.[21] The amount of research being done since the XYY anomaly came before the public eye in 1968 is evidenced by over 160 articles on the topic which have since appeared in various scientific and professional journals.

III. The Current State of the Research: Incidence and Prevalence[22]

A. *Surveys of Institutional Populations — Prevalence*

Most of the surveys conducted to date have been among inmates of various institutions. Many investigations focused on tall inmates in mental and penal institutions because of the earlier finding that XYY individuals were aggressive and tall.[23] From a summary of some recent institutional surveys, it is clear that tall males were screened in a variety of institutions for deviant behavior.[24]

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18 *See* N.Y. Times, Apr. 21, 1968, at 1, col. 3. *See also* Note, *The XYY Chromosome Defense*, 57 Geo. L.J. 892 (1969).

19 *See* Washington Post, Oct. 23, 1968, at B6; *see generally* Bartholomew & Sutherland, *A Defense of Insanity and the Extra Y Chromosome: R v. Hannell*, 2 Australian & New Zealand J. Criminology 29 (1969). Recent reports show that the chromosome anomaly may have had little to do with the acquittal.

20 *See* Chicago Herald Tribune, Nov. 26, 1968, § 1A, at 16, col. 1. *See also* Note, *supra* note 18, at 892. Although Speck's attorney announced that tests had shown his client's chromosomes to be normal, news and professional articles often refer to Speck as an XYY "type."

21 NIMH Report, *supra* note 7.

22 Defined note 11 *supra*.

23 *See* text at note 10 *supra*.

24 *See* Appendix, Table I, which summarizes recent institutional surveys with a nonexhaustive list. The majority of studies selected only tall males for screening. Numerous variations are found in all studies: multi-divergent populations were

Sample sizes ranged from 11 to 607 and for the percentage of individuals found ranged from zero to 18.2. One hundred and three subjects with the XYY anomaly were found among the 5,342 persons screened, resulting in an overall prevalence rate of 1:52 among the specially selected institutional groups. Note that this is not the prevalence rate for general institutional populations due to the screening by height. Findings from eight surveys[25] which did not screen for height show a rough prevalence rate for the general institutional population of 1:140.[26]

B. *Surveys of Newborn Infants — Incidence*

Several surveys of newborns have been undertaken, and out of a total of 6,700 infants, 12 were found to be XYYs.[27] This suggests a rate of 1:550 at birth, a rough estimate. This study has been updated recently and the data on unselected infants now show a rate of 1:518.[28]

C. *Surveys of the Adult Community at Large*

Price and Jacobs have recently studied about 1,000 males in the "normal" adult male population.[29] They obtained a prevalence rate of 1:1,036, generally similar to the newborn rate.[30]

D. *Conclusions on Incidence and Prevalence Research*

The above data are far from precise and adequate — they merely represent rough approximations and consequently present a major obstacle to understanding the XYY phenomenon.[31] As the NIMH Report points out: the studies to date supply little

studied, age groups were mixed, and sample size varied. *See also* NIMH REPORT, *supra* note 7, at 7.

25 *Id.*

26 Note the varying nature of these populations and the size of their reference groups.

27 NIMH REPORT, *supra* note 7, at 20.

28 *See* Appendix, Table II. The NIMH REPORT determined these surveys to be so variable in technique, methodology, and in other respects that firm incidence rates could not be derived.

29 *See* Appendix, Table III. The unusual nature of the groups studied resulted in a *lower* prevalence rate than might be expected based on the unselected infant rate. *See also* NIMH REPORT, *supra* note 7, at 9.

30 *See* Price & Jacobs, *The 47, XYY Male with Special Reference to Behavior*, 2 SEMINARS IN PSYCHIATRY 30 (1970).

31 Since these data are the jumping-off point for any hypotheses and generalizations, any imprecision in them will be reflected in the XYY research.

information about the characteristics of the populations studied; in an effort to facilitate the discovery of XYY individuals they use a variety of screening criteria; in an obvious rush to the printer they have sample sizes ranging from 11 to 607.[32] Since more detailed investigation is virtually stymied until larger samples with higher base rates are surveyed, and since the current lack of information in most studies makes conclusions unwise and comparison of data impossible, the effects upon the individual and society must be theorized with caution.

Moreover, the Report points up some rather substantial methodological problems. The Public Health Service sets regulations regarding human research subjects. They require the informed consent of the individual who is involved in the research.[33] A problem arises because chromosome variation studies to determine incidence and prevalence demand ascertainment of the study populations, but when informed consent must be obtained, some unrepresentative fraction of the study population may refuse to participate in the study. The results are thus biased.[34]

Because of the sensitive and widely publicized nature of the research, problems of confidentiality and privacy loom large. Although the XYY chromosome has yet to be linked causally to antisocial behavior, institutional authorities may use such incipient data to make decisions because of the vast misunderstanding of the XYY anomaly.[35] It would be unfortunate if persons were identified and the length of their confinement biased due to inconclusive data. Self-fulfilling prophecy problems can arise as responses from others toward the "stigmatized individual" are of a form promoting aggressive behavior. This problem is especially

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32 *See* Appendix, Table I.

33 *See* PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, PROTECTION OF THE INDIVIDUAL AS A RESEARCH SUBJECT, GRANTS, AWARDS, CONTRACTS (1969). The Public Health Service guidelines state:

> An individual should generally be accepted as a research subject only after he, or his legally authorized guardian or next of kin, has consented to his participation in the research. Such consent is valid, however, only if the individual is first given a fair explanation of the procedures to be followed, their possible benefits and attendant hazards and discomforts, and the reasons for pursuing the research and its general objectives.

34 *See* NIMH REPORT, *supra* note 7, at 28.

35 *Id.* 29.

thorny because there is no privilege to keep research information out of a courtroom, unless given by statute.[36] There are obvious problems in testing new births and determining who should be provided with the results — doctor, patient, hospital, parents, or state.

Thus methodological problems in combination with the substantive problems of sample size, selectivity, characterization, and standardization regarding incidence and prevalence studies suggest that such data not be used for decisions of broad social policy. Such applications cannot be made until more extensive studies are done on all populations: newborns, the general population, and the institutional populations, and for all groups within those populations.[37]

IV. The Current State of the Research: XYY and Social Behavior

A. *Recent Research*

The 1968 publicity as well as the early studies linked the XYY anomaly to aggressive, antisocial males. To confirm the conclusions of early findings and recent publicity indicating that the XYY is more prevalent among inmates in mental and penal institutions, several recent studies have focused on these institutions.

Welch[38] studied inmates in an institution for "defective delinquents" where men were confined for "persistent, aggravated, antisocial or criminal behavior." After screening for height the sample size was 35; they found only one XYY individual. Their findings do not support an association between an XYY constitution and aggressive behavior:

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36 The statutory privilege which in many states protects the physician's or psychiatrist's patients and the psychologist's clients from having confidential information revealed from a witness stand, does not apply to information obtained in research. Only eleven states presently have statutes that recognize the confidentiality of general research information in the public health area (California, Florida, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, South Dakota, and Texas). *See* Schwitzgebel, *Confidentiality of Research Information in Public Health Studies*, 6 Harv. Legal Commentary 187-97 (1969).

37 *See generally* NIMH Report, *supra* note 7, at 9.

38 *See* Welch, Borgaonkar & Herr, *Psychopathy, Mental Deficiency, Aggressiveness and the XYY Syndrome*, 214 Nature 500 (1967).

Price and Whatmore[39] observed nine XYY males and 18 controls (XY) at the maximum security prison at Carstairs, Scotland, and concluded that: 1) XYY inmates committed significantly fewer crimes against persons than the controls in the institution; 2) the controls were more openly hostile and violently aggressive than XYYs; 3) XYYs as a group showed distinctly earlier manifestations of disturbed behavior than the controls; 4) frequency of crime among siblings of XYYs was significantly lower than the controls; 5) XYYs suffered from severe personality disorders, which appeared to resist conventional forms of treatment.[40] They made the following clinical observations on the XYYs:

> Their personalities show extreme instability and irresponsibility. They have few constructive aims for the future and the plans they make are generally unrealistic. In their emotional responses they show very little depth of affection for others and their capacity for understanding is more limited than would be expected from their level of intelligence. They display an impaired awareness of their environment which appears, at least partly, to account for their inability to respond appropriately to the ordinary requirements of life. Their greatest difficulty . . . arises from emotional instability, combined with an incapacity to tolerate the mildest frustration.[41]

Clark[42] compared XXY and XYY males in Pennsylvania institutions. They found little difference in conviction records but did find, similar to Price and Whatmore, that XYY males came into conflict with their families and society at an earlier age.

Hope[43] compared seven XYY individuals with 11 matched controls for psychological testing to assess hostility, dependence, and other personality traits. There were few significant differences between the two groups. The XYY individuals, however, were rated lower on self-esteem and introversion.

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39 *See* Price & Whatmore, *Behavior Disorders and the Pattern of Crime Among XYY Males Identified at a Maximum Security Hospital*, 1 BRIT. MED. J. 533 (1967).

40 *Id.* 536.

41 *Id.* 534.

42 *See* Clark, Telfer, Baker & Rosen, *Sex Chromosomes, Crime, and Psychosis*, 126 AM. J. OF PSYCHIATRY 1659 (1970).

43 *See* Hope, Philip & Loughran, *Psychological Characteristics Associated with XYY Sex Chromosome Complement in a State Mental Hospital*, 113 BRIT. J. OF PSYCHIATRY 495 (1967).

B. *The Problem of Conflicting Data*

The leading proponent of distinguishing individuals on the basis of the XYY anomaly is Price, mentioned above.[44] He concludes that:

> It is clear that each one of the XYY patients had suffered from a severe disturbance of his whole personality and also that in none was intellectual function, at any level, sufficiently adequate to suppress the disordered drives leading to criminal behavior. In considering all aspects of their behavior as a group, we have found no reason to implicate any particular aspect of personality. In most or all of these patients intellectual capacity, sexual instincts, aggressive impulses, and emotional responses all showed evidence of immaturity, defective development, or inadequate control. There is no reason to believe that these patients would have indulged in crime had it not been for their abnormal personalities. There is no predisposing family environment, and their criminal activities often start at an age before they are seriously influenced by factors from outside the home.[45]

He reasons that by the process of elimination, one can remove all the standard explanations for this type of behavior; only one conclusion remains: that the major distinction between the controls and the XYY males is their chromosome anomaly which has resulted in a "severely disordered personality" leading them into conflict with the law. If this conclusion is compared with the general conclusion of XYY researchers, the conflict is apparent.[46]

Other researchers have identified a syndrome which classifies the XYY as tall, acned, mentally subnormal, aggressive, and antisocial.[47]

In contrast to these widely held views it must be noted that of the approximately 200 XYY individuals studied to date, a wide range of both physical and behavioral characteristics are found aside from height, acne, and aggressivity, such as heart defects[48]

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44 *See* text at note 39 *supra.*
45 Price, *supra* note 39, at 536.
46 *See* text at note 53 *infra.*
47 *See* text at notes 10-16 *supra.*
48 *See* Court Brown, *Males with an XYY Chromosome Complement*, 5 J. MED. GENETICS 341-59 (1968).

and oversized gonadal development.[49] Moreover, many XYY individuals appear to be physically normal with average intelligence.[50]

It seems that XYY males have a wide range of physical and behavioral traits. For this reason conclusions on an XYY "package" are not in order.

C. *Conclusions on the XYY and Social Behavior*

A greater prevalence for XYY males among institutional populations[51] compared to general populations is clear, but classification of XYY individuals as aggressive and antisocial is not supported by the evidence. Also, people in institutions are a special sub-group — the "losers"; no generalization to *all* "criminals" can be made since successful criminals are never part of the samples — only those who were apprehended, convicted, and sentenced. Furthermore, a man cannot be labeled deviant merely because he is an XYY when all that is shown is a concidence of the two traits.

One must remember that antisocial behavior, like all behavior, is the result of complex interactions between heredity and environment. Where and when an act is committed and who is there are also important in classifying behavior.

At the NIMH Conference a good illustration of the heredity-environment problem arose.[52] When a policeman confronts a group of boys, he will focus on the taller boys as leaders. Thus, the genetically determined trait of body height may lead to the environmental influences that accompany a police record, jail, and delinquency generally.

In short, a causal relationship between the XYY anomaly and socially deviant behavior has not yet been established. One participant in the NIMH Conference summarized the Conference view on the XYY anomaly as a determinant of behavior in this way:

> It is through complex interaction of all kinds of contingencies

49 *See* Vignetti, *XYY Chromosomal Constitution with Genital Abnormality*, 2 LANCET 588 (1964).

50 *See* Stenchever, *A Normal XYY Man*, 1 LANCET 680 (1969).

51 *See* text at notes 23-30 *supra*.

52 *See generally* NIMH REPORT, *supra* note 7, at 13-14.

> and priorities mediated by language, culture, and environment, that the inherited organic characteristics affect behavior. It is extremely speculative to assume there is a high predictability from *genotype* to complex behavior such as committing a crime. Moreover, until large numbers of non-institutionalized XYY males can be studied, generalizations about the behavioral correlates of the extra Y chromosome, *e.g.* increased aggressivity and antisocial behavior, should be held in abeyance.[53]

On the other hand, others at the Conference summarized their position in a slightly different way:

> It certainly could not be said that all infants with the XYY chromosome complement at birth will be confined in some institution. However, on the basis of our present knowledge they would appear to have an increased risk of developing socially maladaptive and deviant patterns of behavior.[54]

Based on all studies available, a valid general statement is that the XYY individual, in comparison to XY males, appears to incur some increased risk of developing behavioral problems. However, there is no evidence that an XYY individual will inevitably develop antisocial traits or behavioral problems.

Furthermore, all the social behavior research to date on the XYY anomaly was viewed with some skepticism by the Conference because of various methodological problems. Most studies have not used "double-blind" procedures,[55] which require that during the course of the study neither the persons studied nor the investigators know which persons are the primary research subjects and which are matched controls. This method is designed to prevent bias in expectation and evaluation (for parents as well as researchers). The Conference also noted that a need for careful matching was not being met.[56] Controls were selected and then great weight placed on the differences between them and XYY individuals. If comparisons of the two groups are to be valid, they must be matched on all major traits (intelligence, height, etc.).

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53 NIMH REPORT, *supra* note 7, at 15.
54 *Id.*
55 *See* NIMH REPORT, *supra* note 7, at 25.
56 *Id.* 26.

V. Medical Conclusions

The data are not yet complete nor is that which has been done entirely satisfactory. Although studies indicate a higher institutional than general population rate for XYY individuals, to date an XYY individual cannot be isolated either physically or behaviorally.

The only conclusion that can be drawn accurately at this time is that there is *some* association between the XYY anomaly and atypical socialization for excessively tall inmates of institutions. However, the NIMH Report concludes that behavioral aberrations implied or documented to date indicate no direct cause and effect relationship with the XYY anomaly. The Report finds it impossible to associate definitely the XYY anomaly with behavioral abnormalities.

On the other hand, the current data do suggest that an XYY as compared with an XY individual appears to incur an increased risk of developing behavioral problems. However, this is not to say that an XYY individual will necessarily be drawn into a deviant behavior pattern.

More information is necessary and no major social policy decisions should be based on the XYY anomaly until studies fill in the gaps, both substantive and methodological, delineated above. Social policy, however, is now being formulated. What should be done about it? This inquiry is the subject of the remainder of this Note.

VI. The Current Misdirected Effort: The Criminal Process

In light of the current state of XYY research, the effort of lawyers and legal commentators to classify the XYY "syndrome" as a form of insanity for purposes of pleading has been rather unfortunate. The XYY anomaly has three areas of possible deployment in forensic psychiatry: the insanity defense, incompetence to stand trial, and civil commitment. For reasons to be stated, it is the thesis of this Note that in light of the medical evidence the future of the XYY anomaly, in the legal process, if one exists, lies in the area of civil commitment; moreover, the future of all com-

mitment lies in the civil area, provided different criteria for commitment are accepted.

Legal applications of the XYY anomaly to date either considered or actually included the anomaly as a defense against criminal responsibility.[57] All have tried to establish a basis for diminishing criminal intent and thus criminal responsibility.[58]

There are four major theories by which a court may find someone not guilty by reason of insanity. The prevailing theory in this country is the M'Naghten Rule which permits the establishment of an insanity defense only if the accused was acting under a defect of reason from a disease of the mind so as not to know what he was doing at the time of the act, or if he knew what he was doing, he did not know he was doing wrong.[59] This criterion is known as the "right-wrong test" and obviously involves cognition and mental illness. In some jurisdictions M'Naghten was superseded or supplemented by the "irresistible impulse" rule which requires the accused to have lost his power to choose between right and wrong (a destruction of his free will) as a result of a disease of the mind or a mental disorder of such an extreme nature that his conduct had practically nothing in common with that of the ordinary man.[60] A third test, the Durham Rule, states that the accused is not criminally responsible if a jury finds his unlawful act was the product of an actual mental disease or defect, and there is a causal connection between such mental abnormality and the act.[61] The fourth test may be found in the Model Penal Code.[62] Under this rule a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality of

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57 *See* text at notes 18-20 *supra.*

58 *See, e.g.*, People v. Tanner, 13 Cal. App. 3d 596, 91 Cal. Rptr. 656 (1970) (where defendant was denied a motion to plead insanity after presenting the testimony of six doctors attempting to establish a causal relationship between his XYY anomaly and his criminal conduct); Millard v. State, 8 Md. App. 419, 261 A.2d 227 (1970) (where the defendant claimed directly that his XYY condition was a mental disease which "diminished his criminality").

59 M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

60 *See, e.g.*, Parsons v. State, 81 Ala. 577, 597, 2 So. 854 (1887); Ryan v. People, 60 Colo. 425, 153 P. 756 (1915); Miller v. Commonwealth, 236 Ky. 448, 33 S.W.2d 590 (1930); State v. White, 58 N.M. 324, 330, 270 P.2d 727, 731 (1954).

61 Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

62 Model Penal Code § 4.01 (Tent. Draft No. 4, 1962).

his conduct or to conform his conduct to the requirements of law. All these tests require a mental disease or defect as well as a causal link between the disease or defect and the act.

The present state of the law and the present state of the research suggest the misapplication of XYY evidence to the insanity defense. At the present time even if the XYY anomaly is genetically confirmed in an individual, no mental disease or defect is established, nor is a causal relationship established between the XYY anomaly and the individual's behavior.

The NIMH Conference's formal consensus was:

> The demonstration of the XYY karotype in an individual does not, in our present state of knowledge, permit any definite conclusions to be drawn about the presence of mental disease or mental defect in that individual. A great deal of further scientific evidence is needed.[63]

This conclusion is based on all the research published as of October, 1970. Furthermore, the Conference recognized that the basic issue is not only whether or not the XYY anomaly is classified as a mental disease or defect but also turns on whether or not there is a causal relationship between the XYY anomaly and a person's cognition of right or wrong or his capacity to regulate and be responsible for his behavior. The latest research indicates that a cause and effect relationship between XYY individuals and their antisocial behavior has not been established — only the probability of such a relationship exists; there is no conclusive proof the XYY anomaly affects an individual's behavior.[64] Thus, to say an XYY individual is not responsible for his actions is a legal conclusion not supported by the research.

Two recent cases have echoed these conclusions regarding the XYY anomaly as an insanity defense. In declining to reverse a conviction of an armed robber who claimed his XYY condition as a mental disease or defect diminishing his criminality, the Maryland Court of Special Appeals said:

> We do not intend to hold as a matter of law that a defense based on the so called XYY genetic defect is beyond the pale of proof under the insanity statute. We only conclude that

63 NIMH Report, *supra* note 7, at 17.
64 *See id.*

> in the record before us the trial judge properly declined to permit the case to go to the jury—a determination which, contrary to the defendant's further contention, is not violative of any of his constitutional rights.[65]

An even stronger stand was taken by a California court in which Raymond Tanner, charged with rape and assault, presented much of the medical evidence discussed above,[66] along with the testimony of six doctors of his own, to establish a defense of insanity grounded in his XYY anomaly. In denying his motion to so plead the court said:

> We are only on the threshold of determining whether there is a cause and effect between the XYY chromosome count and the behavior of an individual . . . . [R]esearch in this field should be continued and . . . at a future date, perhaps 20 or 30 years from today, we will be in a better position to determine whether or not there be a relationship between behavior and the XYY chromosome.[67]

In addition the court said that the XYY complement does not indicate that a person's mental state is affected.[68]

Thus, the courts and the researchers have declared that the XYY anomaly is not yet recognized as a mental disease or defect nor is a causal relationship established. Yet lawyers and commentators persist in their attempts to introduce the XYY anomaly as a basis for an insanity defense. For example, they have likened XYY individuals to epileptics who have been found not criminally responsible for some of their acts, as well as to mongoloids, who have been viewed as victims of a physiological disease which causes them to commit violent acts.[69] The epileptic and the mongoloid are said to have no way to control their actions and consequently cannot be held responsible for such actions.

These analogies are forced. While the epileptic and the mon-

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65 Millard v. State, 8 Md. App. 419, 261 A.2d 227 (1970).

66 *See* text at notes 29-47 *supra.*

67 People v. Tanner, 13 Cal. App. 3d 596, 91 Cal. Rpt. 656 (1970). Similarly, the California Court of Appeals rejected the XYY chromosome aberration theory under its version of the M'Naghten Rule by stating that the theory showed conclusively neither that the aggressive behavior was caused by the chromosome abnormality nor that the presence of such chromosomes constituted a mental disease.

68 *See id.*

69 *See* A Rosenberg & L. Dunn *supra* note 2.

goloid are not criminally responsible for their acts because they lack the requisite control for physiological reasons, the XYY individual has not been shown to approximate such a syndrome to date. Moreover, in light of the complex interactions among hereditary, social, and environmental factors, a direct analogy is virtually impossible.

Even though there is presently no medical basis for the insanity defense under the four major tests,[70] lawyers and commentators, believing the XYY individual to be a misfit having no free will and yet not being "insane," are willing to create fictions by expanding the scope of mental illness, by attempting to reform M'Naghten towards the Model Penal Code test, and by drawing biologically inappropriate analogies to epileptics and mongoloids. Fortunately, none of these tactics has yet met with any success. But even if they should succeed, both society and the accused would be worse for the "victory."

If an XYY individual successfully pleaded insanity based on his chromosome anomaly, he would find himself in a compulsory criminal commitment proceeding. He would then find himself confined for life by his own efforts. He would have successfully equated his XYY condition with "mental disease or defect" and would have gone on to link causally this condition with his acts. In the present state of genetic research it is widely believed that a genetically determined trait (or disease-defect in this case) remains intact in varying degrees throughout the life of the individual.[71] Also, there is presently no definition of treatment or cure for the XYY anomaly. Thus, once, the disease for which he was committed is established as "in his genes," he can expect never to be released. On the other hand, although his XYY condition may not qualify him for the insanity defense, no research to date suggests that an XYY individual is completely normal. So, if his defense of insanity is unsuccessful and he is sentenced to a finite term, society then has to reabsorb him later in an untreated state since no treatment facilities exist in prison for genetic anomalies.

In short, from both the medical and legal points of view, with

70 The XYY anomaly is not yet considered a mental disease or defect nor has a causal link been established between the XYY anomaly and behavior.

71 *See* NIMH REPORT, *supra* note 7, at 18.

one exception, the insanity defense does not seem to be the optimal point of entry for XYY data in their present, or possibly even future, form.[72] The exception is a rather remote possibility.

If the theories of criminal insanity moved from their present emphasis on mental disease or defect, however, towards "responsibility" (in the absence of mental disorder), XYY data could be employed in an insanity defense. The data seem to permit the legal conclusion that an XYY defendant may not be criminally responsible since he lacks criminal capacity. Although this would make the task of counsel easier, by permitting the insanity defense to encompass the XYY defendant, there remains the problem of indeterminate compulsory criminal commitment once the XYY defendant "succeeds." Thus, even in the unlikely event that insanity standards are modified, the criminal process does not well serve the XYY individual.

VII. The Optimal Point of Entry: The Civil Process

A. *The Civil Commitment Process*

The civil commitment process is the most appropriate area for future application of XYY data. The process varies among states but generally provides that a "mentally ill person" may apply to any public or private hospital in the state for admission by his own action, that of his friends or relatives, that of a duly accredited officer or agent, or that of a court instituted by the filing of a petition by spouse, parent, legal guardian, physician, duly accredited officer or agent. Upon such application and admission the person is observed, diagnosed, treated, and released by the chief of service of the hospital in accordance with the particular law of each state.

There are four focal areas for the civil commitment process. First, in the unlikely and unfortunate possibility that an XYY defendant successfully pleads insanity based on his XYY anomaly under one of the four leading insanity theories, a court would be

72 The same argument can be made against applying the XYY anomaly to incompetence to stand trial, except application would be at a later stage, at trial instead of at the time of the crime. The results are equally undesirable.

well advised to provide civil commitment hearings after acquittal by reason of insanity instead of the present virtually automatic and indefinite confinement which follows a compulsory criminal commitment proceeding. Second, in the unlikely but desirable possibility that the theories of criminal insanity move away from the present mental disorder standard and towards a "responsibility" test, the XYY defendant will qualify for the insanity defense with greater facility. Then it will become even more important to avoid the inevitable compulsory criminal commitment proceedings in favor of civil commitment after a successful insanity defense. Note that in the two applications above the insanity defense is preserved; civil commitment is merely substituted for automatic compulsory criminal commitment due to insanity. Although a person may be incarcerated after this civil commitment for a period shorter than his potential prison term, there is no inequity because he is not being punished since he is not responsible for his acts.

Third, there is a possibility that a court might civilly commit an XYY defendant even after an unsuccessful insanity plea. That is, instead of sentencing him to a finite term, the court would superimpose upon the criminal process the civil commitment process in its entirety. In effect the XYY anomaly would carve out its own special niche.

Finally, the area of greatest application is that of ordinary civil commitment. This involves no remote possibilities as friends, relatives, and other duly qualified people are endeavoring to commit individuals with great frequency.

If civil commitment is opened in these areas, and the route of civil commitment is the only one in and out of mental hospitals, then all that could be accomplished for the XYY individual currently will have been done. As yet, no XYY individual should be civilly committed based on his chromosome anomaly. However, a process will have been opened to the XYY individual should the data develop in a manner which conclusively demonstrates a causal relationship between the XYY anomaly and deviant behavior.

The reasons for this are simple. Fortunately, the civil process is not necessarily tied to mental disease or defect as is the criminal

process; the civil process can accommodate a dangerous individual.[73] Thus, the civil process offers more promise than the criminal one for any application of XYY data since the current data point away from mental disease or defect and towards dangerousness. Note that while none of the researchers mentioned above would conclude at this time that any XYY individual has a mental disease or defect, none of them would deny a strong possibility of aberrant behavior in these individuals. While they have stated that they cannot now label him mentally ill, most XYY researchers would be willing to say that any XYY individual *may* be dangerous to a greater or lesser degree.[74] Although conclusive studies remain to be done, they would be supported by the present, incipient research on both these positions.

Admittedly, many states do require mental disease in civil proceedings but there appears to be some movement away from this towards a modified dangerousness test. For example, California has changed some of its statutory language to "dangerous" as opposed to "mentally ill."[75] Furthermore, many of the present statutes which speak in terms of "mental illness" also refer to "unsound mind" which could be interpreted to include an XYY individual in the present state of the research without the forced analogies encountered in extending the insanity defense.

Moreover, the civil commitment process is especially well adapted for application of XYY data since the research is quite sketchy and inconclusive at present and may remain so for some time; the civil process is laced with flexible positive safeguards which are lacking in compulsory criminal commitment upon acquittal by reason of insanity.[76] These safeguards are extremely

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73 No cases have been found in the criminal insanity defense area against so doing.

74 *See* text at note 54 *supra.*

75 *See, e.g.*, CAL. WELF. & INST'NS CODE §§ 5150, 5300-07 (West 1969).

76 *E.g., release*: D.C. CODE ENCYCL. ANN. §§ 21-512, -527, -548 (West 1967) generally provide in civil commitment (whether voluntary, emergency or by court order) that to release a patient, the chief of service, after determining the patient is no longer mentally ill to the extent that he is likely to injure himself or others if not hospitalized, need only order the immediate release of the patient. In contrast, in criminal commitment the courts play a role and the district attorney may prevent a release, thus making the system unresponsive to new discoveries and trends. *Periodic examination*: D.C. CODE ENCYCL. ANN. § 21-546 (West 1967) permits, upon the expiration of 90 days after a court ordered hospitalization and not more

important in an area of unsettled science. Cases of civil commitment are subject to more review and less stringent release standards. Thus, however future research develops, adjustments can be made in the system with some ease.

By definition, civil commitment does not imply that that entire populations should be screened for the XYY anomaly. Moreover, one should not infer that all or even any XYY individuals are "dangerous" or of "unsound mind" and consequently should be committed. The research to date does anything but compel such action and conclusions. However, XYY research to date does point more toward ultimate tests such as "dangerousness" and "unsound mind" than toward "mental disease" or "mental defect."

B. *Statutory Analysis*

As mentioned above, XYY data application will operate optimally not only if the civil process is employed but also if civil commitment statutes themselves contain "dangerousness" language and not "insanity" language. This point is highlighted by the following analysis of two statutes, each at the opposite end of the spectrum.

The District of Columbia revised its civil commitment statute in 1964 when Congress passed the District of Columbia Hospitalization of the Mentally Ill Act. Mental illness is defined in section 21-501.

> "[M]ental illness" means a psychosis or other disease which substantially impairs the mental health of a person; "mentally ill person" means any person who has a mental illness, but does not include a person committed to a private or public hospital in the District of Columbia by order of the court in a criminal proceeding.[77]

In light of the most recent XYY data, the present conclusions that can be drawn from the data, and the most conservative future implications of the data, the District of Columbia could not account for the XYY anomaly in its civil commitment process. No

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frequently than every six months thereafter, a current examination of patient's mental condition made by one or more physicians, one of which may be of the patient's choosing if at his own expense.

77 *Id.* § 21-501.

expert would say that someone possessing the XYY chromosome is "mentally ill." Thus, in the District of Columbia an XYY individual would either be declared insane and confined for an indeterminate period of time if he could squeeze himself into the insanity defense, or he would be declared sane and left completely free after serving a prison term; both outcomes are equally undesirable.

California has recognized the inadequacy of a civil commitment statute which employs a mental illness yardstick. Mentally ill persons are classified in terms other than mental disease or defect throughout the Lanterman-Petris-Short Act. For example, in sections regarding detention for evaluation and treatment the act states:

> When any person, as a result of mental disorder, *is a danger to others, or to himself,* or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, or other professional person designated by the county may, upon reasonable cause, take, or cause to be taken, the person into custody and place him in a facility designated by the county and approved by the State Department of Health as a facility for 72-hour treatment and evaluation.[78]

The reference to "a danger to others, or to himself" pervades the act in sections on definitions,[79] court-ordered evaluation for mentally disordered persons,[80] and postcertification procedures for imminently dangerous persons.[81]

Unlike the District of Columbia statute, the California statute will permit legitimate application of XYY data. Although the research does not suggest mental disease or defect, it does indicate a strong possibility of aberrant behavior in XYY individuals. Thus, the California civil commitment statute, which contains "dangerous" language, is far more susceptible to future application of XYY data than the District of Columbia civil commitment statute which speaks in terms of "mental illness."[82]

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78 CAL. WELF. & INST'NS CODE § 5150 (West 1969). (Emphasis added).
79 *Id.* § 5008.
80 *Id.* §§ 5200-07, 5213.
81 *Id.* §§ 5300-07.
82 It is true that the 1964 District of Columbia Hospitalization of the Mentally

The statutory trend from "mental illness" to "dangerousness" is a result of the realization that the concepts of mental illness are vague and poorly defined and have been changing within the profession itself. Terms such as mental illness, mental disease, and mental disorder were designed initially for the medical profession and later expropriated by the legal profession to make the task of commitment easier on the committing agent, the courts, the psychiatrists, and society. Thus, the judge often finds a legal rather than a psychiatric fact when he pronounces someone "mentally ill."[83] This is complicated by the fact that even with adequate categorization, a line-drawing problem inevitably arises.

As the legal system grapples with the fact that a "mentally well" person may rampage for no apparent reason[84] and a "mentally ill" person may never commit a deviant act,[85] new criteria are sought. The inconsistency seems to be eliminated by making dangerousness the determinative factor for commitment. This approach is more than a semantic exercise because it would result in releasing many patients currently institutionalized and incarcerating many people currently at liberty. However, the ultimate goal of commitment, which the society that sets our standards claims to be protection from danger to self and to others would be served directly. Our institutions are too crowded and our budgets too small to commit people so they *may* thank you later for opening up new horizons for them. We must focus on the serious business of who presents a danger and the extent of that danger. The California statute carries us a long way towards this goal.

Ill Act achieved positive reforms over the former 1939 provisions for insane persons. The 1964 Act contains very valuable measures such as voluntary hospitalization (sections 21-511 to -514), periodic confinement restraints (sections 21-523, -524, -526, -528, -549), periodic examination and release procedures (sections 21-512, -527, -546, -548), and communications and rights provisions (sections 21-561 to -565), just to mention a few. However, the California statute not only parallels all these positive safeguards, it also provides an entering wedge for application of XYY data.

83 *See* NIMH REPORT, *supra* note 7, at 17.

84 *See, e.g.*, Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957); In Re Williams, 157 F. Supp. 871 (D.D.C. 1958); Williams v. Overholser, 162 F. Supp. 514 (D.D.C. 1958); Williams v. Overholser, 259 F.2d 175 (D.C. Cir. 1958); In Re Williams, 165 F.Supp. 879 (D.D.C. 1958); Williams v. District of Columbia, 147 A.2d 773 (Mun. Ct. App. 1959); Williams v. United States, 312 F.2d 862 (D.C. Cir. 1962), *cert denied* 374 U.S. 841 (1963).

85 *See generally* J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHONANALYSIS, PSYCHIATRY, AND THE LAW 429-59 (1967).

If the law responded by using the concept of dangerousness to encompass the XYY individual only in civil commitment as in California, it would demonstrate a true rapport with science. The law must reflect new medical discoveries and should not try to pigeonhole these discoveries in unsuitable structures, such as the insanity defense. Any sound system should be able to grow and change in accord with scientific knowledge. That time is drawing near as XYY research unfolds — this stage is just the beginning.

C. *A Call for Inaction*

Let there be no misunderstanding. No plan of immediate commitment or screening of XYY individuals is proposed. The proposal is to apply XYY data through a civil commitment-dangerousness scheme in the future, when and if data become more conclusive. Very little, if any, of the research to date merits legal application. Even if future research indicates a strong probability that an XYY individual will commit a deviant act, this statistical finding would have to be combined with clinical analysis. However, the meager data that are currently available do not yet merit legal application — only theorizing. Any civil commitment based only the XYY anomaly would be clearly premature at the present time.

Aside from the course of future research and the method of actuarial-clinical analysis, a major consideration in confining XYY individuals is that of the false positive. That is, how many benign XYY individuals in confinement will society tolerate to prevent "x" amount of deviant behavior. This issue pits society's need to be protected from dangerous persons against the individual's right to be free until he commits a deviant act. The false positive question is integral to the developing research. For example, at present no one is willing to say that any XYY individual is inexorably bound to a life of antisocial conduct; he may be, but enough is not yet known. Thus, under present circumstances, if any number of XYY individuals were committed after one aggressive act, the risk of false positives would be great. If further research shows that the prevalence of XYY individuals in institutions as compared to the general population is extremely high, then the number of false positives would be vastly limited even if many XYY

individuals were committed after one aggressive act. If virtually all XYY males were found in institutions and almost none in the general population, a highly unlikely situation, this fact might be grounds for committal of all XYY individuals prior to any aggressive act. These hypotheses demonstrate the importance of not committing an XYY individual through the civil process until research conclusively demonstrates a causal relation between the XYY anomaly and deviant behavior. However, the utility of commencing with the civil process remains as it is so viable and responsive to research developments in the area.

VIII. Conclusion

Many claim that no system is now available which predicts "target acts"[86] of the "mentally ill." Thus, they argue, it is pointless to speak in these terms with regard to civil commitment. The XYY chromosome anomaly offers the potential for basing a system of civil commitment on target acts. Possibly we may discover that an XYY individual will do "x" number of acts in "y" amount of time with "z" probability; possibly we may not. The incipient research indicates that this may be possible, and the civil commitment-dangerousness scheme will account for it if it is possible and will dispense with it if it turns out to be impossible.

*Lawrence B. Kessler**

86 Doctor Alan Stone of the Harvard Law School defines "target acts" as that number of acts in which an individual is likely to engage in a given period of time with a given probability as determined by a predictive model.

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APPENDIX

TABLE I

SUMMARY OF INSTITUTIONAL SURVEYS PERTAINING TO THE 47, XYY[1]

Investigators	Reference Group Size	Classification	Height Selection (cm.)	No. XYY	Approx. XYY %
Casey et al 1966	100	Maximum Security Hospitals, England	183	16	16.0
Jacobs et al 1968	315	Mentally Disordered Offenders, Scotland	None	9	2.8
Akesson et al 1968	86	Two Mental Hospitals, Sweden	183	4**	2.3
Baker et al 1970	86	Juvenile Detention Center (14-16 yrs), Pa.	183	1	1.2
Baker et al 1970	42	Juvenile Detention Center (15-17 yrs), Pa.	183	0	0
Baker et al 1970	74	State Prisons, Pa.	183	2	2.7
Baker et al 1970	72	City Prisons, Pa.	183	1	1.3
Baker et al 1970	58	City Prison (penal & mentally ill), Pa.	183	1	1.7
Baker et al 1970	82	State Prison (penal & mentally retarded), Pa.	183	0	0
Baker et al 1970	102	State Hosp. for Criminally Insane, Pa.	183	3	3.0
Baker et al 1970	230	State & V.A. Hospitals, Pa.	183	0	0
Baker et al 1970	130	School for Mentally Retarded, Pa.	183	1	0.8
Welch et al 1967	20	"Defective Delinq." aggress. offenders, Md.	188*	0	0
Welch et al 1967	35	"Defective Delinquent" Offenders (various criteria, e.g., particular aggressivity.)	183*	1	3.0
Goodman et al 1967	52	Caucasian Prison Inmates, Ohio	185.4*	2	4.0
Goodman et al 1967	100	Caucasian & Negro Prison Inmates, Ohio	185.4*	2	2.0
Griffiths & Zaremba 1967	34	Wandsworth Prison, England	183	2	6.0
Weiner et al 1968	34	Adult Prisoners, Australia	175.3*	4	12.0
Hunter et al 1968	29	Boys in Approved Schools, England	"tall"	3	10.0
Court Brown 1968	71	Epileptic Colony, England	None	1	1.4
Court Brown 1968	605	Hospital for Mentally Subnormal, England	None	0	0
Cited by: Price & Jacobs 1970	607	New Entrants (1 yr), Scottish Borstals	None	1	0.2

TABLE I (*Continued*)

Investigators	Reference Group Size	Classification	Height Selection (cm.)	No. XYY	Approx. XYY %
Cited by: Price & Jacobs 1970	302	Allocation Center, Soughton Prison, Edinburgh	None	0	0
Cited by: Price & Jacobs 1970	204	Recidivist Criminals, Grendon Prison, England	None	2	1.0
Cited by: Price & Jacobs 1970	419	Inmates, all Scottish Prisons	178	1	0.3
Cited by: Price & Jacobs 1970	74	Young Offenders' Institution, Scotland	178	1	1.4
Cited by: Price & Jacobs 1970	17	Scottish Detention Center	178	0	0
Cited by: Price & Jacobs 1970	34	Wandsworth Prison, England	183	2	6.0
Cited by: Price & Jacobs 1970	24	Nottingham Prison, England	183	2	8.0
Cited by: Price & Jacobs 1970	40	Pentridge Prison, Australia	175	5	12.5
Cited by: Price & Jacobs 1970	19	Hospital for Mentally Subnormal, England	183	2	10.0
Cited by: Price & Jacobs 1970	11	Hospital for Mentally Subnormal, England	183	2	18.2
Cited by: Price & Jacobs 1970	30	Scottish Mental Subnormality Hospital	183	2	6.6
Cited by: Price & Jacobs 1970	183	Scottish Mental Disease Hospitals	183	2***	1.6
Cited by: Price & Jacobs 1970	40	English Mental Disease Hospitals	183	0	0
Melnyck 1969	200	Mentally Disordered Sex Offenders & Criminally Insane, Calif.	183	9	4.5

TABLE I (*Continued*)

Investigators	Reference Group Size	Classification	Height Selection (cm.)	No. XYY	Approx. XYY %
Nielsen 1968	41	State Hospital, Denmark	180	0	0
Nielsen et al 1968	37	Institution for Criminal Psychopaths, Denmark	180.3	2	5.4
Sergovich 1969	230	Hospital for Criminally Insane, Canada	None	4**	1.7
Daly 1969	210	Maximum Security Hospitals, U.S.A.	183	10	5.0
Marinello et al 1969	86	Attica State Prison, N.Y.	183	2	2.3
Marinello et al 1969	76	State Mental Hospital, N.Y.	183	1	1.3
Marinello et al 1969	57	Juvenile Offenders (Detention Home & Court Psychiatric Referrals), N.Y.	None	1	1.8
Abdullah et al 1969	18	Criminal Psychiatric Patients (known for violent behavior), N.Y.	183	1	5.5
Abdullah et al 1969	26	Psychiatric Patients (known for "violent, destructive behavior"), N.Y.	183	0	0

*Height converted to centimeters from inches.

**Includes one mosaic—46, XY/47, XYY.

***One 48, XXYY is not included in this figure.

1 This list is not meant to be complete or exhaustive of all institutional surveys conducted to date; adapted from National Institute of Mental Health (NIMH), Report on the XYY Chromosomal Abnormality (Oct. 1970).

TABLE II

SURVEYS OF 47, XYY NEWBORN MALES IN THE GENERAL POPULATION[1]

Investigators	Location	No. Screened	No. XYY	Remarks
Sergovich et al, 1969	London, Ontario	1066	4	All liveborn infants.
Walzer et al, 1969	Boston, Mass.	1931	0	Phenotypical normal newborn infants.*
Lubs et al, 1968	New Haven, Conn.	2184	3	Consecutive newborns in one hospital, over period of one year.
Turner, 1969	Pittsburgh, Pa.	1023	3	Quoted from Marinello et al, 1969 (52). No details available.
Ratcliffe et al, 1970	Edinburgh, Scotland	3496	5	Consecutive liveborn infants — April 1967 to October 1969.
	Totals	9700	15	
	Incidence Rate 1:646			
	Incidence Rate excluding Boston data* 1:518			

*Since only phenotypically normal infants were screened a bias was introduced in the study.

[1] Adapted from National Institute of Mental Health (NIMH), Report on the XYY Chromosomal Abnormality (Oct. 1970).

TABLE III

SURVEY OF "NORMAL" ADULT MALE POPULATIONS PERTAINING TO THE 47, XYY[1]

Population Studied	No. of Males Examined	No. of XYY Males
General Population Survey	207	0
Industrial Workers	189	0
Non-blood relatives of persons with a familial chromosome abnormality	87	0
Survey of tall (183 cm. or taller) workers in atomic energy establishments	629	0
Blood donors, randomly selected males, relatives of individuals with a chromosome abnormality, and males with neoplastic disease	1875	3
Males in community at large	6340	6
	9327	9
Prevalence Rate 1:1036		

[1] Based on relevant information from Price & Jacobs; adapted from National Institute of Mental Health (NIMH), Report on the XYY Chromosomal Abnormality (Oct. 1970).

ANTITRUST, BARGAINING, AND COOPERATIVES: ABC'S OF THE NATIONAL AGRICULTURAL MARKETING AND BARGAINING ACT OF 1971

Introduction

Farmer power, although not yet a slogan, is probably the result of a widely-held view[1] that farmers do not receive a fair return for their production. Although per capita farm income has consistently lagged below that for the average non-farm worker,[2] such a view necessarily incorporates notions of the static pie phenomenon.[3] Be that as it may, legislation[4] currently under consideration in both the House of Representatives and the Senate seeks to augment farmer income by increasing the bargaining power of agricultural cooperatives. Cooperatives, defined here as collections of agricultural producers seeking to increase their bargaining power by selling with one voice, are an important economic institution in the distribution of food and fiber. During the 1969-70 agricultural year, $14.8 billion of farm products were marketed collectively,[5] and in the past the proportion of commodities so marketed has constituted about 20 percent of the total

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1 *Cf.* M. SNODGRASS & L. WALLACE, AGRICULTURE, ECONOMICS AND GROWTH 402 (2d ed. 1970).

2 U.S. DEP'T OF AGRICULTURE, FARM INCOME SITUATION 4 (1971) ("For the past five years, farm people have averaged about three-fourths of the per capita disposable income of nonfarm residents . . . .").

3 The static pie phenomenon is used here to connote analyses which fail to recognize change over time and instead seek comparisons as of a given moment, holding flux parameters constant. With respect to the farm income analysis suggested by the concept of a "fair return," the desirability of current resource allocation to the agricultural sector must be presumed before inquiring as to the fairness *vel non* of the return. This concept of static farm resources characterizes the response of government to the problems of agriculture. *See* R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 94 (2d ed. 1967): "United States farm policy has centered on supporting the market for farm products, setting a price which is too high to permit all the produce to be sold commercially and then buying up the surplus which results at this price. Attempts have been made to restrict supply to demand at these target prices. But these attempts have not aimed at removing resources from agriculture, but only at causing the resources — farmers, their land and machinery — to grow less crops."

4 *E.g.*, H.R. 7597, 92d Cong., 1st Sess. (1971) [hereinafter cited as H.R. 7597]. The important provisions of the bill, the subject of this Note, are set forth in the Appendix.

5 U.S. Dep't of Agriculture, News Release No. 4302-71, at 1 (Dec. 30, 1971).

production sold by American farmers.[6] A coupling of this economic institution with the belief that farmers are underpaid has made collective bargaining "[o]ne of the hottest topics in agricultural circles today."[7] Indeed, the plea for increased bargaining power even found expression in President Johnson's State of the Union message in 1968.[8]

The current legislative medium for increasing the bargaining power of agricultural cooperatives is the proposed National Agricultural Marketing and Bargaining Act, being considered in the House as H.R. 7597 and in the Senate as S. 1775. These bills enjoy the widespread support of the legislators who must consider them; 69 members of the House either cosponsored H.R. 7597 or introduced identical bills, and ten Senators cosponsored S. 1775.

H.R. 7597 attempts to establish the administrative framework, legal obligations, and antitrust exemptions necessary to develop mandatory collective bargaining in agriculture. The bill consists of three titles. Title I, the most important, imposes a "mutual obligation" upon handlers (defined to include all middlemen except for cooperatives)[9] and qualified associations (cooperatives which have been certified to meet the standards set by the bill)[10] to bargain in good faith over price and other contract terms.[11] A handler is so obligated if he has dealt with producers in an association in any two of the prior five years.[12] The bargaining position of the association is bolstered by provisions which (1) authorize full requirements contracts;[13] (2) prevent the handler from negotiating with others while negotiating with the association;[14] and (3) prohibit the handler from giving to other producers terms more favorable than those already negotiated with an association.[15] Title I also sets up a National Agricultural Bargaining

6 M. SNODGRASS & L. WALLACE, *supra* note 1, at 187.
7 Lemon, *Antitrust and Agricultural Cooperatives Collective Bargaining in the Sale of Agricultural Products*, 44 N.D.L. REV. 505, 505 (1968).
8 114 Cong. Rec. 143 (1968) (President's State of the Union Address).
9 H.R. 7597 § 103(d).
10 *Id.* § 103(b).
11 *Id.* § 106(a).
12 *Id.* §§ 106(a), (b).
13 *Id.* § 106(c).
14 *Id.* § 106(d).
15 *Id.* § 106(e).

Board[16] which certifies qualified associations[17] and receives, investigates, and adjudicates complaints concerning refusals to bargain.[18] The Board's orders are to be enforced and reviewed by the federal courts of appeals.[19] Finally, Title I gives an antitrust exemption for the bargaining "activities" of the associations and handlers.[20] Title II authorizes a "check-off" system for the collection of cooperatives' fees and dues through their contracts with handlers. Title III amends the Agricultural Adjustment Act (AAA) of 1933 to expand the use of AAA marketing orders despite previous exceptions if a majority of the affected producers express their approval through a referendum.

Concentrating on H.R. 7597, this Note seeks to analyze the bill's provisions in terms of two previously existing legal contexts: labor and antitrust law. Although this dichotomy is not at all times complete[21] or all-encompassing, the significance of H.R. 7597 lies in its application of labor collective bargaining to agricultural bargaining and in its relaxation of the antitrust law for agricultural cooperatives. The Note concludes that neither pursuit is desirable, thus urging rejection of H.R. 7597 and the statutory scheme embodied therein.

I. NLRA Collective Bargaining As Used In H.R. 7597

Because H.R. 7597 is similar to existing labor legislation, its interpretation can be assisted by an examination of relevant labor law decisions. In general, this examination gives substance to the bill's obligation to bargain in good faith. More importantly, it also suggests unexpected and undesirable meanings for sections 106(c) (which authorizes requirements contracts) and 114 (which exempts bargaining activites from the antitrust laws). A review of these meanings shows H.R. 7597 to be an unwise legislative

16 *Id.* § 104(a).
17 *Id.* § 105(c).
18 *Id.* §§ 106(f),(g),(h),(i).
19 *Id.* § 107(a).
20 *Id.* § 114.
21 For instance, § 114 of H.R. 7597, a section which deals with an antitrust exemption, is discussed within the labor framework since the scope of the exemption depends on the labor comparison and the definition of "good faith bargaining."

vehicle. Section I of this Note goes one step further to demonstate that, even in the absence of problems with sections 106(c) and 114, labor concepts of mandatory collective bargaining could not provide an effective approach to the farm income problem because of basic economic differences betwee laborers and farmers.

A. *The NLRA and H.R. 7597*

H.R. 7597 would establish mandatory collective bargaining in agriculture. Collective bargaining is already possible under the present antitrust exemption.[22] For various reasons[23] the producers are now asking that their option to bargain collectively be augmented by the imposition of an obligation upon the handlers to deal with cooperatives. The National Labor Relations Act[24] (NLRA) gave this recognized status to unions;[25] H.R. 7597 seeks to similarly provide for producer cooperatives.[26] An obvious similarity between H.R. 7597 and the NLRA is the statutory language used in each to define the duty of collective bargaining.[27]

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22 See the text accompanying note 146 *infra*.

23 *See, e.g., Hearings on H.R. 7597 Before the Subcomm. on Domestic Marketing and Consumer Relations of the House Comm. on Agriculture*, 92d Cong., 1st Sess., Ser. 92-M, at 50-51 (1971) [hereinafter cited as *H.R. Hearings*] (remarks of A. Lauterbach, general counsel for Farm Bureau) (alleging discrimination against cooperative organizers).

24 National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.* (1970) [hereinafter cited as NLRA].

25 The 1935 NLRA imposed a bargaining duty only upon employers. 49 Stat. 449 (1935). The 1947 Taft-Hartley amendments extended the duty to unions. 61 Stat. 136 (1947).

26 One difference is that H.R. 7597 extends only to the level of the farm unit, not to the individual farm worker. This is important because agricultural workers are excluded by NLRA § 2(3) from the protection of the NLRA. To insure that any increased farm income resulting from H.R. 7597 will be passed on to the farm families, perhaps the bill should provide for a repeal of the NLRA exclusion. For a discussion of the need for unionization of farm workers see Note, *Unionization of the Agricultural Labor Force: An Inquiry of Job Property Rights*, 44 S. CAL. L. REV. 181 (1971).

27 NLRA § 8(d):

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

H.R. 7597 § 106(a):

Several reasons exist for assuming that the newly-created Agricultural Bargaining Board and the reviewing courts of appeals will look to judicial interpretation of the NLRA to interpret the language of this bill if enacted. First, the legal concept of good faith collective bargaining is unique to the labor field.[28] Judicial bodies prefer to base decisions upon established precedent and they will find little authority to aid in cases interpreting H.R. 7597 outside of labor law. Second, the language similarities between the NLRA and H.R. 7597 would be evidence for an adjudicating body that the bill was patterned after the NLRA and, therefore, that the Congress intended the bill to be given the same interpretation as that given to the NLRA. Third, an adjudicating body, in ascertaining the intended meaning of phrases used in a new act, may correctly attribute to Congress a knowledge of prior judicial construction of those phrases.

B. *Good Faith Collective Bargaining As Used in H.R. 7597*

H.R. 7597 section 106(a) defines "bargaining" as the "mutual obligation of a handler and a qualified association to meet at reasonable times and negotiate in good faith." Creation of the obligation seems to be the main purpose of H.R. 7597.[29] Experi-

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> As used in this title, "bargaining" is the mutual obligation of a handler and a qualified association to meet at reasonable times and negotiate in good faith with respect to the price, terms of sale, compensation for commodities purchased under contract, and the other contract provisions relative to the commodities that such qualified association represents and the execution of a written contract incorporating any agreement reached if requested by either party. . . . Such obligation does not require either party to agree to a proposal or to make a concession.

Also, the language of NLRA §§ 10(e), (f), and (g) concerning judicial enforcement or review of an order by the National Labor Relations Board is nearly identical with H.R. 7597 §§ 107(a), (b) and (c) for an order by the National Agricultural Bargaining Board.

For some reason, perhaps by oversight, H.R. 7597 does not contain a counterpart to NLRA §§ 8(a)(5) and 8(b)(3) (which establish the duty of management and union to bargain as defined in § 8(d)) other than by implication from its procedure (§ 106(f)) and remedy (§ 106(h)) provisions.

28 Research disclosed no non-labor definitions of collective bargaining.

29 "A Bill [t]o create a National Agricultural Bargaining Board, to provide standards for the qualification of associations of producers, to define the mutual obligation of handlers and associations of producers to negotiate regarding agricultural products, and for other purposes." Preamble to H.R. 7597. "This Ad-

ence with good faith bargaining under the NLRA[30] can provide some insight into what this obligation may require.

The duty to bargain in good faith[31] imposed by the NLRA has been defined in several ways.[32] Professor Cox has summarized the principal cases in his comprehensive definition of the duty: "[t]he employer (or union) must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach a common ground, but it need make no concessions and may reject any terms it deems unacceptable."[33] He goes on to comment:

> One can argue that the formulation is too self-contradictory to survive. Either section 8(a)(5) [of the NLRA] must simply require union recognition and the formalities of negotiation, it is said, or else it must require that plus the making of objectively reasonable proposals. But I think that the ambivalent statement has meaning even though it borders on paradox.[34]

Paradoxical or not, in labor law "good faith bargaining" certainly

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ministration is dedicated to the goal of improved farm net income. An important tool in achieving this result can be responsible farm bargaining. We recognize . . . H.R. 7597 as a step in that direction." *H.R. Hearings*, at 19 (remarks of Richard Lyng, Assistant Secretary of the Department of Agriculture).

30 See discussion of the similarities between H.R. 7597 and the NLRA in the text accompanying notes 24-28 *supra*.

31 For thorough discussions of the evolution in labor law of the concept of good faith bargaining see Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941) and Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988, 989-92 (1961).

32 *See, e.g.*, cases cited in note 33 *infra*.

33 *E.g.*, Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1416 (1958). Other statements of the duty are: "These sections [§§ 8(a)(5), 8(b)(3), & 8(d)] obligate the parties to make an honest effort to come to terms; they are required to try to reach an agreement in good faith." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154 (1956) (concurring in part and dissenting in part); "Collective bargaining is not merely an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." NLRB v. Insurance Agents' Union, 361 U.S. 477, 485 (1959). *See also* NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943); NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 885 (1st Cir.), *cert. denied*, 313 U.S. 595 (1941); NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134-35 (1st Cir.), *cert. denied*, 346 U.S. 887 (1953); NLRB v. Western Wirebound Box Co., 356 F.2d 88, 92 (9th Cir. 1966). *Montgomery Ward* and the first *Reed & Prince* case were decided before § 8(d) was added to the NLRA in 1947. For a review of the substituted definition of "bad faith" used by some courts see Cox, *supra* note 33, at 1417 n.57.

34 Cox, *supra* note 33, at 1416.

obligates the parties to do more than merely go through the formalities of negotiation.[35]

The result of applying the labor law definition of good faith bargaining to section 106(a) is that when a handler and a qualified association are obligated by the bill to bargain,[36] they must do more than merely meet and discuss contract terms. The handler, regardless of his own choice of suppliers, must have a sincere desire to reach an agreement with the association.[37] He cannot be willing to agree *only* on his own terms.[38] He may be required to supply data to support any of his arguments based on the market or other economic factors.[39] Some of his actions or inactions may be held to be per se violations[40] of section 106(a).[41] However, the handler will not be prevented from hard bargaining[42] and will not be required to agree to a proposal or to make a concession.[43] Nevertheless, he will be prevented by section 106(d) from negotiating with other producers "while negotiating" with an association able to meet at least most of his needs. The association is not likewise restricted.[44] The handler may be excused from this obligation if negotiations reach a genuine impasse on any subject of mandatory bargaining.[45] However, the difficulty in determining if an impasse has actually occurred may make this an alternative in theory only.[46]

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35 *See* NLRB v. Insurance Agents' Union, 361 U.S. 477, 485 (1960); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 154 (1956) (concurring in part and dissenting in part); *cf. id.* at 152-53.

36 A handler is obligated to bargain with a qualified association that represents producers with whom he has dealt in two of the prior five years. H.R. 7597 § 106(a), (b). H.R. 7597 does not specify when, if ever, the association is so obligated.

37 See note 33 *supra.*

38 *Cf.* NLRB v. Insurance Agents' Union, 361 U.S. 477, 487 (1960); Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 265 (1964).

39 *Cf.* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

40 *Cf.* NLRB v. Katz, 369 U.S. 736 (1962). For a discussion of the *per se* doctrine under the NLRA see Duvin, *supra* note 38, at 266-86.

41 "Section 106 explicitly deals with two hardcore instances where negotiations are definitely not in good faith. These are found in subsection (d) and subsection (e) of section 106." *H.R. Hearings*, at 35 (remarks of Ralph B. Bunje).

42 *See, e.g.*, Sign & Pictorial Local 1175 v. NLRB, 419 F.2d 726, 738 (D.C. Cir. 1969).

43 H.R. 7597 § 106(a).

44 In addition, an association of producers, qualified or not, is explicitly excluded from the § 103(d) definition of "handler" so that an association acting as a handler is free from the restriction of § 106(d).

45 *See* NLRB v. Wooster Div. of Borg-Warner, 356 U.S. 342, 349 (1958).

46 *See* Comment, *Unilateral Action as a Legitimate Economic Weapon: Power Bargaining by the Employer Upon Expiration of the Collective Bargaining Agreement*, 37 N.Y.U.L. REV. 666, 673 (1962).

One significant effect of the H.R. 7597 obligation to bargain arises from the differences rather than the similarities between the labor and agricultural bargaining situations. Bargaining in the labor context traditionally includes numerous important subjects other than wages; for example, "holiday and vacation pay, discharges, pensions, bonuses, profit sharing, work loads and work standards, insurance benefits, the . . . union shop, subcontracting, shop rules, work schedules, rest periods, and merit increases."[47] The collective bargaining contract constitutes the "law" of the shop.[48] Negotiation of a contract for the sale of an agricultural product would probably not require many significant terms other than price. Therefore, if the association offered to contract at the predicted market price with reasonable terms of delivery and storage, the handler could not refuse without risking a violation of his obligation under H.R. 7597.[49] In effect, the obligation to bargain may *require* the handler to buy from the association. This result may accomplish the purposes of the bill. However, the approach is not true "good faith bargaining" for it gives the association, which has no corresponding obligation to bargain,[50] the option to force an agreement. This bargaining power may be used initially by associations not to increase prices for their products, but, contrary to the stated purpose of the bill,[51] to gain control of the market outlets and thereby force independent farmers to join the associations.

C. *Can H.R. 7597 Be Used To Force Requirements Contracts?*

H.R. 7597 increases the bargaining power of cooperatives in the following ways: (a) requiring a handler to bargain in good faith with qualified[52] associations (*i.e.*, qualified cooperatives) which

47 Cox & Dunlop, *Regulation of Collective Bargaining By the National Labor Relations Board*, 63 HARV. L. REV. 389, 397-98 (1950).

48 "The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960) (citation omitted).

49 Although the courts have repeatedly stated that the NLRA does not authorize a finding of bad faith bargaining solely from the content of bargaining proposals, *e.g.*, NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 408-09 (1952), that content is still used in conjunction with other factors as evidence of bad faith. *See* NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

50 See note 36 *supra*.

have members with whom the handler dealt with in any two of the preceding five years;[53] (b) allowing contracts for the full requirements of handlers;[54] (c) making it unlawful for a handler to negotiate with other farmers while negotiating with a qualified association which is able to supply at least a substantial part of the commodity involved;[55] (d) making it unlawful for a handler to purchase a commodity at more favorable terms for the producer than were negotiated with a qualified association;[56] and (e) exempting the bargaining activities from the federal antitrust laws.[57] The full significance of these sections may not become apparent from a reading of the bill; their interrelation magnifies their effects. For example, while H.R. 7597 on its face appears only to increase the bargaining power of cooperatives vis-a-vis handlers, the bill also enables cooperatives to dominate markets at the expense of independent producers. This domination will be made possible by full requirements contracts,[58] which appear only to be authorized by the bill, but which the cooperatives will be able to force upon handlers.

The cooperative's bargaining power begins with the handler's section 106(a) obligation to bargain in good faith. The cooperative can impose that requirement upon numerous handlers because by sections 106(a) and (b) any handler who has dealt with any of the producers[59] of an association in two of the previous five years must bargain with that association. The bill purports to give some protection to the handler because the obligation to bargain "does not require either party to agree to a proposal or to make a con-

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51 H.R. 7597 § 101: "Congress has already found that . . . the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together *voluntarily* in cooperative organizations." (Emphasis added.)

52 H.R. 7597 § 105(a).

53 *Id.* § 106(a),(b).

54 *Id.* § 106(c).

55 *Id.* § 106(d).

56 *Id.* § 106(e).

57 *Id.* § 114.

58 This section discusses full requirements contracts within the context of good faith bargaining. Full requirements contracts within the antitrust context are discussed in the text accompanying notes 150-200 *infra.*

59 The use of "producers" in the plural in § 106(a) may mean, however, that the obligation applies only if the handler has dealt with two or more or possibly a majority of the producers in a qualified association.

cession."[60] This protection is, however, of limited value. By section 106(d) the qualified association can prevent a handler from buying elsewhere as long as it continues negotiations in good faith.[61] The meaning of "good faith" is critical here. If "good faith" is given a liberal construction,[62] a qualified association could tie up many of the important handlers of a commodity in a given geographical area while it negotiates with all of them. Independent farmers would be forced to join the association to have a market for their products.

Even with a more restricted construction of "good faith bargaining,"[63] an association could gain control of a large portion of the market. Section 106(c) allows an association to bargain for full requirements contracts[64] with handlers. To build up its control of outlets an association would conceivably accept terms more favorable to the handler (thereby making the appearance of good faith bargaining) while holding out for requirements contracts. Once most of the available outlets have come under the association's control, it could then restrict new membership, in effect dividing the market between the existing members and eliminating independent farmers. This result would of course be lessened if more than one association were qualified to market each commodity in the area. Nevertheless a high premium would be placed upon winning the race for qualification[65] and then restricting handlers by beginning negotiations.

Section 106(e) adds an unusual element to cooperative-handler

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60 H.R. 7597 § 106(a). This wording was probably adopted from the NLRA; see the discussion of the obligation to bargain in good faith in notes 22-28 *supra* and accompanying text.

61 Section 106(d) prevents the handler from negotiating with "other producers of a product" while bargaining with a qualified cooperative. This may be read to apply only against outside handler-independent producer negotiations. However, the broad definition of "producer" in § 103(f) seems to make § 106(d) apply against outside handler-cooperative negotiations as well, once one cooperative has commenced bargaining with that handler.

62 For example, in NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960), the Supreme Court held that a union had not failed to bargain in good faith even though the union conducted a partial strike during contract negotiations.

63 For example, the Agricultural Bargaining Board conceivably may hold that a cooperative is not sincerely trying to reach an agreement if it bargains concurrently with several handlers.

64 See discussion of the antitrust aspects of § 106(c) in the text accompanying notes 189-200 *infra*.

bargaining.[66] Because of that section, a cooperative can be very lenient about other contract terms when it is seeking full requirements contracts through bargaining. The section prevents a handler from offering outside producers terms more favorable than those in a contract already negotiated with a cooperative. If through his contract with a cooperative a handler does not acquire sufficient products to fulfill his obligations, he will be limited by section 106(e) to those contract terms when making offers to other producers. If the earlier contract terms were unfavorable to the cooperative, the handler will later be unable to buy additional supplies from other producers. In other words, unless a handler agrees to a contract guaranteeing his full requirements when bargaining with a cooperative, he will have his own interest in keeping the contract terms favorable. The handler may be in a similar position even if he does not reach an agreement with the cooperative. If the handler refuses the cooperative's attractive offer because of the full requirements aspect and then pays a higher price to other producers, he may be violating the obligation to bargain in good faith.[67]

Decisions concerning the subjects of good faith bargaining under

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65 The National Agricultural Bargaining Board, established by H.R. 7597 § 104(a), qualifies associations if, after a public hearing, they are found to meet the detailed requirements of H.R. 7597 § 105(c). Only qualified associations receive the benefits of the bill. H.R. 7597 § 105(a).

66 Section 106(e), restricting the handler's future offers to the terms of an existing contract, magnifies the importance to farmers of early qualification of their association and greatly increases their bargaining power thereafter. This result may go beyond the intended purpose of § 106(e). On its face the section appears to be drafted only for the purpose of preventing discrimination by handlers against producers who are bargaining collectively. This was the interpretation given to § 106(e) by Ralph B. Bunje, general manager of the California Canning Peach Association. *H.R. Hearings*, at 36. If that is indeed the only purpose of § 106(e) it is unnecessary and should be deleted because § 2303(b) of the 1967 Unfair Agricultural Trade Practices Act, 7 U.S.C. § 2301 *et seq.* (1970), already prevents such discrimination: "It shall be unlawful for any handler . . . (b) [t]o discriminate against any producer with respect to price, quantity, quality, or other terms of purchase, acquisition or other handling of agricultural products because of his membership in or contract with an association of producers . . . ."

But see H.R. Hearings, at 50 (remarks of Allen Lauterbach, general counsel for the Farm Bureau) (discrimination in violation of the Fair Practices Act is next to impossible to prove).

67 Under the NLRA it is a per se violation of the duty to bargain for an employer unilaterally to increase wages by an amount substantially greater than that offered in negotiations with the union. *See* NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949).

the NLRA are instructive[68] in determining that a cooperative could insist upon a full requirements clause in good faith bargaining under H.R. 7597. In *NLRB v. Wooster Division of Borg-Warner Corp.*[69] the Supreme Court held that a party may deadlock negotiations by insistence upon a proposal only if that proposal is "within the scope of mandatory collective bargaining as defined by section 8(d) of the [NLRA]."[70] Borg-Warner Corporation had insisted upon a "ballot" clause and a "recognition" clause, both of which the Supreme Court found were not mandatory subjects of bargaining.[71] The *Borg-Warner* opinion divides the subjects of collective bargaining into three classes: (a) those which are mandatory and within which a party can negotiate and insist upon his proposal as a condition of agreement; (b) those which are permitted but not mandatory and within which a party can negotiate but not insist upon his proposal; and (c) those which are illegal and within which a party can neither negotiate nor insist upon his proposal.[72] The *Borg-Warner* Court held that for the NLRA the mandatory subjects of collective bargaining are "wages, hours, and other terms and conditions of employment."[73]

If the *Borg-Warner* decision is applied to H.R. 7597, then an association of producers could freely propose but not insist upon a full requirements provision to the point of impasse, unless that provision were within the subjects of obligated bargaining. The provision would not be illegal because of section 106(c). By analogy to *Borg-Warner*, H.R. 7597 arguably makes the following areas of mandatory bargaining: "price, terms of sale, compensation for commodities produced under contract and other contract provisions relative to the commodities that such qualified association represents."[74] If this analogy is valid, full requirements contracts may be "other contract provisions relative to the commodities that such qualified association represents" and therefore within an area of mandatory collective bargaining. In the NLRA context the

68 See the text accompanying notes 22-28 *supra*.

69 356 U.S. 342 (1958).

70 *Id.* at 344. For criticism of the *Borg-Warner* rule see H. WELLINGTON, LABOR AND THE LEGAL PROCESS 76-83 (1968), and Fleming, *supra* note 31, at 993-98.

71 356 U.S. 342, 349-50 (1958).

72 *Id.* at 349.

73 *Id.*

74 H.R. 7597 § 106(a).

Supreme Court established three tests in *Fibreboard Paper Products Corp. v. NLRB*[75] to determine if the subject matter of the union-management dispute was a mandatory (statutory) subject of collective bargaining. The tests were (1) whether the subject matter came within the literal meaning of the bargaining subjects of NLRA section 8(d); (2) whether a duty to bargain on the subject effectuated the policy of the NLRA to promote industrial peace;[76] (3) whether collective bargaining on the subject was part of the industrial practice.[77] Applying the *Fibreboard* criteria to the wording of section 106(a), the conclusions follow that requirements contracts are (1) within the literal meaning of "other contract provisions relative to the commodities" and may be (2) within the policy of the bill because requirements contracts are explicitly authorized. However, because they are sometimes illegal,[78] requirements contracts cannot be characterized as (3) within agricultural bargaining practice. Nevertheless, the *Fibreboard* case does not seem to make criterion (3) a necessary condition, and therefore, by satisfying (1) and (2), requirements contracts are probably made a mandatory subject of bargaining under H.R. 7597.

Under this interpretation of H.R. 7597 an association of producers can insist upon a full requirements contract from the handler. The handler is not obligated to accept.[79] However, he would be obligated to negotiate in good faith on a full requirements proposal within the framework of the bargaining advantage which H.R. 7597 gives to the association.[80]

D. *The Antitrust Exemption for Bargaining Activities in H.R. 7597*

Section 114 exempts from antitrust law "[t]he activities of qualified associations and handlers in bargaining with respect to the price, terms of sale, compensation for commodities produced under

75 379 U.S. 203 (1964).

76 *Id.*; *cf.* Duvin, *The Duty to Bargain: Law in Search of Policy*, 64 COLUM. L. REV. 248, 248 (1964).

77 379 U.S. at 210-11.

78 See the discussion of requirements contracts under existing antitrust law in the text accompanying notes 150-81 *infra*.

79 *Cf.* NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402, 404 (1952).

80 *E.g.*, H.R. 7597 § 106(d), (e).

contract, or other contract terms relative to agricultural commodities produced." This exemption may only be intended to allow collective bargaining by the association of producers. If so, the exemption is unnecessary because existing law already allows that practice.[81] On the other hand, section 114 may expand the cooperatives' bargaining arsenal.

Section 114 as written exempts the "activities . . . in bargaining" of associations and handlers; it does not exempt the "associations," or "handlers," or the actual "bargaining." This particular language, although seemingly of minor importance, may become of more significance when interpreted within the context on the entire bill. Section 106(a)[82] defines the term "bargaining" as it is used in Title I, which includes section 114.[83] An integration of the two sections seems reasonable in order to understand the possible meanings of the word "activities." Of primary concern are the economic pressures which have been held to be activities consistent with good faith bargaining in labor cases and which would arguably be authorized and exempted from antitrust law by H.R. 7597.

The Supreme Court held in *NLRB v. Insurance Agents' International Union*[84] that certain economic-pressure tactics used by a union during contract negotiations were consistent with good faith bargaining. In the *Insurance Agents* case the union and the company had begun negotiations on a new collective bargaining agreement to replace an agreement which was to expire in two months. Negotiations continued for six months before agreement was reached. After the existing contract had expired, the union planned and carried out certain on-the-job harassments to apply economic pressure to the company. This harassment included, among other things, concerted work slowdowns by the employees. The NLRB, following its prior rulings,[85] held that this activity constituted a per se violation[86] of the union's duty[87] to bargain

81 See discussion of Clayton Act § 6 and Capper-Volstead Act in the text accompanying notes 116-47 *infra*.

82 H.R. 7597 § 106(a).

83 *Id.* § 114.

84 361 U.S. 477 (1960).

85 *E.g.*, Textile Workers Union (Personal Products), 108 N.L.R.B. 743 (1954), *modified*, 227 F.2d 409 (D.C. Cir. 1955).

86 119 N.L.R.B. 768 (1957).

87 *See* NLRA § 8(b)(3).

in good faith. The court of appeals reversed.[88] In the Supreme Court's opinion, Mr. Justice Brennan stated as the issue:

> whether the Board may find that a union, which confers with an employer with the desire of reaching agreement on contract terms, has nevertheless refused to bargain collectively, thus violating that provision, solely and simply because during the negotiations it seeks to put economic pressure on the employer to yield to its bargaining demands by sponsoring on-the-job conduct designed to interfere with the carrying on of the employer's business.[89]

The Court held that the union had not failed to bargain in good faith. The Court explained that "the presence of economic weapons in reserve, and their actual exercise on occasion by the parties is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[90]

The *Insurance Agents* case is a clear statement by the Supreme Court that within the labor law context economic pressures, even if they consist of unprotected activities,[91] are consistent with good faith collective bargaining.[92] This holding may have important consequences for the meaning of the antitrust exemption for bargaining activities as used in H.R. 7597. Certain economic pressures in labor relations, for example strikes or lockouts, do not have any obvious counterparts in agricultural bargaining. But, there are economic pressures (*e.g.*, boycotts, predatory pricing, blacklisting, tying arrangements) which have heretofore been held to violate[93] the antitrust laws but which H.R. 7597 may be construed to authorize.

The preceding argument, that H.R. 7597 as presently written would legalize previously illegal forms of economic pressure, can be summarized as follows: (a) section 114 exempts bargaining activities from the antitrust laws; (b) the section 106(a) meaning of "bargaining" will probably be interpreted by reference to labor

88 260 F.2d 736 (D.C. Cir. 1958).
89 NLRB v. Insurance Agents' Union, 361 U.S. 477, 479 (1960).
90 *Id.* at 489.
91 *Id.* at 494.
92 *Id.* at 489. The *Insurance Agents* doctrine also applies to a lockout by the employer. American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965).
93 *E.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (boycott); International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangements).

cases; (c) good faith collective bargaining under the NLRA has been held to include the use of economic weapons, whether or not protected;[94] (d) therefore, H.R. 7597 exempts from the antitrust laws economic pressures which are used during section 106(a) bargaining. This argument, of course, is not conclusive.[95] Nevertheless, before acting on H.R. 7597 Congress should consider all reasonable constructions of its terms to determine if the bill effects any unintended changes in existing law.

E. *The Labor Law Concepts of H.R. 7597*

Before the labor law statutory scheme is adopted for agriculture, a comparison of the economics of farmers and laborers is necessary to determine if the labor scheme is a feasible solution to the farm income problem. Assuming *arguendo* that mandatory collective bargaining is working within the labor context,[96] its success within the agricultural context does not necessarily follow. Two differences between labor and agriculture would cause the labor scheme to fail for agriculture: (a) farmers, unlike laborers, can expand production by capital assets, and (b) farmers have no automatic supply controls to prevent surplus.

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94 NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

95 If the wording of § 114 is retained and H.R. 7597 is enacted, the preceding argument about the expanded meaning of the antitrust exemption would certainly not be conclusive on that issue. First, courts traditionally have given a narrow construction to exemptions from the antitrust laws. *See* United States v. Borden Co., 308 U.S. 188, 198-200, 206 (1939). Second, unlike NLRA §§ 7 and 13, H.R. 7597 does not explicitly establish a right to use economic pressures. Courts should therefore be more reluctant to hold that the bill authorizes otherwise illegal economic pressures. Further, in NLRB v. Insurance Agents' Union, 361 U.S. 477, 494-95 (1960), the Court said:

> The reason why the ordinary strike is not evidence of a failure to bargain in good faith is not that it constitutes a protected activity but that, as we have developed, there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining.

Therefore, *Insurance Agents* arguably does not expand the range of economic pressures available to participants in labor disputes; it only holds that economic pressures, protected or not, are not inconsistent with collective bargaining. This reading of *Insurance Agents* would make more difficult the argument that the case could be used to authorize the exercise of economic weapons within the collective bargaining scheme of H.R. 7597.

For a somewhat stronger reading of *Insurance Agents* see Duvin, *supra* note 76, at 284.

96 *But see, e.g.*, Comment, *Collective Bargaining—Is it Working*, 4 LOYOLA U. (LA) L. REV. 361 (1971).

Among other relevant differences[97] between agriculture and labor, of primary significance is that farmers sell combinations of capital and labor while laborers, for the most part,[98] sell only their labor.[99] This combination of capital assets with labor would enable farmers to increase production significantly in response to any price increases gained by collective bargaining.[100] The result would be a surplus which would erode the price advantage.

The capital per farm worker in agriculture is surprisingly large with its greatest increase occurring in recent years. The production assets per farm worker were $3,326 in 1940; $9,529 in 1950; $21,304 in 1960; and $41,307 in 1967.[101] Land constitutes a portion of these assets. Average farm size has shown comparable increases since 1940: 174 acres in 1940; 215 acres in 1950; and 303 acres in 1959.[102] Also, the increased mechanization of farm operations has increased farmer productivity[103] on these larger farm acreages. Moreover, the farm owner makes production decisions not only as a capitalist, but also as an employer of labor.[104] Therefore, the average farmer can consider shifting or increasing farm equipment and other farm materials, acreage, and farm employees in making production decisions. He can multiply production resources in response to a favorable price increase in any commodity which he is capable of producing.

The preceding discussion perhaps pertains only to large farms; small farms frequently have few capital assets other than land and utilize no labor other than that of the farm owner and his family. Nevertheless, the discussion seems applicable to an analysis of the H.R. 7597 bargaining scheme because the true concern in this context is not the number of farms but rather the total farm production involved. For 1966 the 1.03 million farms (32 percent of all farms) that had annual gross sales above $10,000 produced over

97 Lemon, *supra* note 7, at 523-24.

98 *See* S. RICE, FARMERS AND WORKERS IN AMERICAN POLITICS 40-41 (1924).

99 *See H.R. Hearings*, at 241 (remarks of F. T. Heffelfinger on behalf of the National Grain and Feed Association).

100 *See* Lemon, *supra* note 7, at 524.

101 M. SNODGRASS & L. WALLACE, *supra* note 1, at 104.

102 ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, LOW INCOMES IN AGRICULTURE 500 (1964).

103 Barton, *Increased Productivity of the Farm Worker*, 1 IND. & LABOR REL. REV. 264, 269 (1948).

104 *See id.* 265; Rice, *supra* note 98, at 68-69.

85 percent of all farm sales. Of the 2.2 million farms which produced the remaining 14.6 percent, the numerous 1.4 million small farms with gross sales below $2500 produced a mere 3.5 percent of farm sales.[105] In other words, if agriculture is viewed in terms of total production, the large farms, which usually have high capital investments and also employ non-family workers, are responsible for nearly all of this nation's agricultural production. In evaluating the effects of H.R. 7597, therefore, only a negligible error enters the analysis by the assumption that all of the agricultural producers involved will be farm owners who make production decisions as capitalists and employers.

The flexibility in production decisions of agricultural producers stands in sharp contrast to the "production decisions" of laborers. The modern laborer does not own "a perceptible portion of the capital in connection with which [his] labor has been employed."[106] His response to increased wages in an industry can only be through a shift in his employment or perhaps, within limits, through his working overtime hours. In sum, the effect of wage level changes upon the labor supply is quite small in comparison to that of price changes upon agricultural supply.

Agriculture also lacks the automatic supply controls of the labor context which are necessary to provide and maintain a higher than competive price or wage. If the NLRA has been effective for labor, it is because a collective bargaining agreement can be insulated from increases in supply from external or internal sources. This result has been effectuated by the section[107] of the NLRA which provides that the collective bargaining agreement applies to all employees within the bargaining unit. As a result, the employer must pay the increased wage to new employees as well as to those who did the bargaining, so that he will not hire the numerous outsiders who may have been willing to work for a reduced wage. The employer will also control internal supply because of his interest in limiting employees' overtime hours. The unions have perpetuated this preferred inside position of existing employees

105 Comment, *Farm Fiasco: The Inappropriate Federal Response to the Problems of the Rural Poor*, 42 S. CAL. L. REV. 701, 705-06 (1969).

106 Rice, *supra* note 98, at 40-41. As workers obtain capital stock in their corporation-employers, they obtain a share of the ownership. *Id.* 41.

107 NLRA § 9(a).

by bargaining to protect them from discharge. In sum, laborers have the ability under the NLRA to attain higher wages than would be possible without mandatory bargaining because the economic factors of employment keep an automatic control on supply. Of course, the employees can attain wage gains only within the limits created by the employer's financial ability to pay and the costs of available substitutes for labor, such as automation.

In the agricultural context the pressure for surplus production caused by a higher-than-competitive price would not be automatically handled. The bargaining association must first meet the problem of new entrants. Unlike the bargaining unit concept in labor, the bargaining scheme in H.R. 7597 does not prevent outside producers from selling below the negotiated price. Section 106(e) prohibits only higher, not lower, prices to outsiders. The bill's authorization of full requirements contracts may be an attempt to alleviate this surplus problem.[108] Also, even assuming that associations could solve the problem of outside supply, the problem of internal surplus due to the artifically-high price must be faced. Somehow the association must put artificial controls on production to restrict the total supply of the commodity involved. The possibility of success is uncertain.[109] Possible price increases are also very limited by substitution of other agricultural, non-agricultural or imported commodities. Moreover, even if the association could restrict non-member and member supply while avoiding substitution, the nation's economy as a whole would sustain a loss, because the more modern and efficient producers would not be able to increase their percentage of the market. In short, the differences between labor and agriculture will be certain to frustrate the H.R. 7597 goal of raising farm income by utilizing the labor law system of mandatory collective bargaining.

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108 This Note concludes that the anticompetitive effects of full requirements contracts are so significant that authorizing them would be a costly mistake. See the text accompanying notes 189-200 *infra*.

109 At present, the legality of production control imposed by cooperatives on their members is questioned. Saunders, *The Status of Agricultural Cooperatives Under the Antitrust Laws*, 20 FED. B.J. 35, 51-52 (1960), and commentators caution cooperatives in their use of such programs to limit supply. *Agricultural Cooperatives and the Antitrust Law*, 43 NEB. L. REV. 73, 101-02 (1963); *see* Lemon, *supra* note 7, at 515-16.

II. The Antitrust Laws and H.R. 7597

H.R. 7597 is presently construed as granting agricultural cooperatives the privilege of utilizing full requirements contracts without fear of violating the antitrust laws. To understand the ramifications of the privilege, this discussion separately examines the antitrust status of agricultural cooperatives and full requirement contracts, and then considers the two in combination as presented in the bill. The point of entry is the beginning of federal antitrust law itself.

A. *The Antitrust Exemption for Agricultural Cooperatives*

In 1890, Congress enacted the Sherman Act,[110] the fountainhead of trade regulation legislation. Although specific exemption was sought for agricultural and labor organizations,[111] language to that effect was not included. Therefore, the operation of the Sherman Act logically reaches agricultural cooperatives[112] and has been so construed in dictum by the Supreme Court.[113] That Congress

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110 15 U.S.C. §§ 1-7 (1970). The act provides, *inter alia:*

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .
>
> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .
>
> § 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia . . . is hereby declared illegal.

111 21 Cong. Rec. 2611, 2731 (1890). This amendment was offered by the author of the Act, Senator Sherman, and provided:

> this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of labor or of increasing their wages; nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products.

112 *See* Saunders, *supra* note 109, at 36 ("Technically, because farmers are independent entrepreneurs engaged in agricultural production for their own account and profit, their joint pricing and marketing of farm commodities does involve elimination of competition.").

113 In Loewe v. Lawlor, 208 U.S. 274, 301 (1908), the Court stated that "[t]he records of Congress show that several efforts were made to exempt, by legislation, organizations of farmers and laborers from the operation of the [Sherman Act]

intended such a result has been questioned;[114] however, agricultural cooperatives feared they would be held combinations and conspiracies in restraint of trade and hence in violation of the Sherman Act.[115] The resulting tension was evidenced in the enactment of the Clayton Act[116] in 1914. Section 6 of that Act provides, in part:

> Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.[117]

The scope of the exemption granted in the phrase "lawfully carrying out the legitimate objects thereof" was subject to varying interpretations by the members of Congress,[118] but probably was intended to permit application of the antitrust laws to the activities of farmers in forming organizations for pecuniary gain or in attempting to monopolize or restrain trade.[119] In its first judicial interpretation,[120] the section was so read, although that construction has not been uniformly applied.[121]

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and that all these efforts failed, so that the act remained as we have it before us." There the Court applied the Sherman Act to the members of a union.

114 *E.g.*, Lemon, *supra* note 7, at 506; Note, *Agricultural Cooperatives*, 27 Ind. L.J. 353, 434 (1952); 51 Cong. Rec. 9246-47 (1914) (remarks of Rep. MacDonald).

115 *Agricultural Cooperatives*, *supra* note 114, at 434-35.

116 38 Stat. 730 (1914), *as amended*, 15 U.S.C. § 12 *et seq.* (1970).

117 15 U.S.C. § 17 (1970).

118 *Compare* 51 Cong. Rec. 9571 (1914) (remarks of Rep. Webb) *with id.* 13848 (remarks of Sen. Thompson).

119 *Agricultural Cooperatives and the Antitrust Laws*, *supra* note 109, at 77 & n.14.

120 United States v. King, 250 F. 908, 910 (D. Mass. 1916) ("[O]rganizations such as [the Clayton Act] describes are not to be dissolved and broken up as illegal, nor held to be combinations or conspiracies in restraint of trade; but they are not privileged to adopt methods of carrying on their business which are not permitted to other lawful associations.").

121 *E.g.*, United States v. Dairy Co-op. Ass'n, 49 F. Supp. 475 (D. Ore. 1943), where the court, in allowing a motion for a finding of not guilty of defendants indicted for violation of the antitrust laws, held that an agricultural cooperative, acting alone cannot be punished under the antitrust laws—even though the acts complained of were monopolistic. In reaching this conclusion, the court considered judicial treatment of labor under § 6 of the Clayton Act:

The exemption created for agricultural cooperatives was expanded[122] in 1922 with the passage of the Capper-Volstead Act.[123] Hailed by one writer as the "Magna Charta of Agriculture,"[124] the Act provides in section 1:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes.[125]

Section 2[126] permits the Secretary of Agriculture, after a show-cause hearing, to issue cease and desist orders to associations monopolizing or restraining trade. Like section 6 of the Clayton Act,

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> An older generation of judges interpreted the Clayton Act . . . to defeat the plain intent of law, and, almost perversely, it seemed, sought to impose their economic views on the American scene in the controversial field of capital and labor. The result was the enactment of the Norris-LaGuardia Act . . . , and it may be said . . . the Wagner Act . . . .
>
> . . . .
>
> The nation is paying a severe penalty in this time of peril for reactionary judicial thought and decision of twenty or more years ago.

49 F. Supp. at 475. The case was a criminal one not subject to appeal by the government. Saunders, *supra* note 109, at 43 n.36. One commentator has advised cooperatives to completely ignore the decision. Note, *Agricultural Cooperatives and the Antitrust Laws: Clayton, Capper-Volstead, and Common Sense*, 44 VA. L. REV. 63, 82 (1958).

122 The degree of the expansion has been debated by both courts and commentators. *Compare* Jensen, *The Bill of Rights of U.S. Cooperative Agriculture*, 20 ROCKY MT. L. REV. 181, 190 (1948) *and* Mischler, *Agricultural Cooperative Law*, 30 ROCKY MT. L. REV. 381, 393 (1958) *with* Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 465-66 (1960) *and* Lemon, *The Capper-Volstead Act — Will It Ever Grow Up*, 22 AD. LAW REV. 443, 445 (1970).

123 42 Stat. 388 (1922), 7 U.S.C. §§ 291-92 (1970).

124 Jensen, *supra* note 122, at 190.

125 7 U.S.C. § 291 (1970). The section is qualified in three ways: (1) the association must be operated for the mutual benefit of its members as producers; (2) the association must allow each member no more than one vote because of the amount of stock or membership capital he may own therein, or limit its payment on stock or membership capital to 8 percent per annum; or meet both requirements; and (3) the association must not deal in the products of non-members to an amount greater in value than such that are handled by it for members.

126 7 U.S.C. § 292 (1970).

the Capper-Volstead Act lacks a definitive legislative history,[127] leading courts to construe its exemption in varying ways.[128] The language of the exemption is not the "indisputably exempting language of the type used by Congress in other statutes conferring antitrust immunity" where Congress typically declares that " 'the antitrust laws shall not apply' " or that persons are " 'relieved from the operation of the antitrust laws.' "[129] Therefore, the antitrust exemption created by the Capper-Volstead Act and section 6 of the Clayton Act has rarely been seen as absolute.[130]

The limits of the privilege granted agricultural cooperatives with regard to the antitrust laws have been considered in four Supreme Court cases, two of which have particular importance for the discussion here.[131] In *United States v. Borden Co.*[132] the government alleged a combination and conspiracy in violation of section 1 of the Sherman Act between parties involved in the transportation and marketing of fluid milk within the Chicago area, including a cooperative association of milk producers in Illinois. The four counts of the charge involved a price-fixing scheme to impose uniform prices on all distributors of milk bound for the Chicago area; an enforced system of uniform, fixed prices for the sale of milk in Chicago; a concentrated effort to curtail new independents through coercive devices; and an attempt to limit the supply of milk moving into Chicago by use of a base surplus plan. The lower court[133] held, *inter alia*, that the agricultural cooperative and its officers were exempted from prosecution

127 For an excellent discussion of the legislative history quagmire involved in the enactment of Capper-Volstead see Saunders, *supra* note 109, at 37-40.

128 *Compare* April v. National Cranberry Ass'n, 168 F. Supp. 919, 923 (D. Mass. 1958) and Maryland & Virginia Milk Producers Ass'n, Inc. v. United States, 362 U.S. 458, 466-67 (1960) *with* United States v. Maryland Cooperative Milk Producers, Inc., 145 F. Supp. 151, 155 (D.D.C. 1956).

129 Saunders, *supra* note 109, at 37.

130 *E.g.*, REPORT OF U.S. ATT'Y GEN.'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 307 (1955) [hereinafter cited as ATT'Y GEN.'S REP.]; Lemon, *supra* note 7, at 512-13; Hufstedler, *A Prediction: The Exemption Favoring Agricultural Cooperatives Will Be Reaffirmed*, 22 AD. LAW REV. 455, 459 (1970); Saunders, *supra* note 109, at 45. *But see* United States v. Dairy Co-op Ass'n, 49 F. Supp. 475 (D. Ore. 1943).

131 The two cases not considered herein are Sunkist Growers, Inc. v. Winckler & Smith Co., 370 U.S. 19 (1962), and Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967).

132 308 U.S. 188 (1939).

133 United States v. Borden Co., 28 F. Supp. 177 (N.D. Ill. 1939).

under section 1 of the Sherman Act by sections 1 and 2 of the Capper-Volstead Act. The Supreme Court, in an opinion by Mr. Chief Justice Hughes, reversed both holdings, reasoning:

> the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk . . . and thus in effect . . . "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago."[134]

No justification, the Court concluded, could be found in section 1 of the Capper-Volstead Act for "[s]uch a combined attempt of all the defendants, producers, distributors, and their allies, to control the market."[135] Neither would the Supreme Court accept the lower court's view of section 2 of the Capper-Volstead Act that "under § 2 an exclusive jurisdiction with respect to the described cooperative associations is vested, in the first instance, in the Secretary of Agriculture, and that, until the Secretary acts, the judicial power to entertain a prosecution under the Sherman Act cannot be invoked."[136] Rather, the Court concluded that "the procedure under § 2 of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to the cooperative agricultural producers by § 1 . . . ."[137]

In *Maryland & Virginia Milk Producers Association, Inc. v. United States*,[138] the Supreme Court again considered the antitrust exemption of agricultural cooperatives. There, in a civil action, the government charged, *inter alia*, that the defendant milk producer association had (1) attempted to monopolize and had monopolized in violation of section 2 of the Sherman Act; and (2) through contracts and agreements, combined and conspired to eliminate and foreclose competition in violation of sec-

134 308 U.S. at 205 (citing United States v. Borden Co., 28 F. Supp. 177, 180-82 (N.D. Ill. 1939)).
135 *Id.*
136 *Id.*
137 *Id.* at 206.
138 362 U.S. 458 (1960).

tion 3 of the Sherman Act. Holding that an agricultural cooperative acting only in conjunction with agricultural producers was entirely exempt from the antitrust laws, the district court[139] dismissed the charge brought under section 2 of the Sherman Act. Consequently, the Supreme Court, in reviewing the dismissal, considered the allegations made in the complaint:

> The complaint . . . alleged that the Association had "[t]hreatened and undertaken diverse actions to induce or compel dealers to purchase milk from the defendant [Association], and induced and assisted others to acquire dealer outlets" which were not purchasing milk from the Association. It also alleged that the Association "[e]xcluded, eliminated, and attempted to eliminate others, including producer and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers."[140]

After reaffirming the auxiliary jurisdiction holding of *Borden*, the *Milk Producers* Court went beyond the earlier decision and considered the immunity of agricultural cooperatives from the reach of section 2 of the Sherman Act.[141] Having previously held

139 167 F. Supp. 45 (D.D.C. 1958).

140 362 U.S. at 468. Further:

> Supporting this charge the statement of particulars listed a number of instances in which the Association attempted to interfere with truck shipments of nonmembers' milk, and an attempt during 1939-1942 to induce a Washington dairy to switch its non-Association producers to the Baltimore market. The statement of particulars also included charges that the Association engaged in a boycott of a feed and farm supply store to compel its owner, who also owned an Alexandria dairy, to purchase milk from the Association, and that it compelled a dairy to buy its milk by using the leverage of that dairy's indebtedness to the Association.

Id.

141 The second and third charges dealt with the cooperative's acquisition of Embassy Dairy, the largest dealer in the area competing with the cooperative's dealers. The second charge alleged a violation of § 7 of the Clayton Act, relating to acquisitions which tend to create monopolies or substantially lessen competition, while the third, alleging a violation of § 3 of the Sherman Act, involved the terms by, and setting in which, the cooperative acquired Embassy. The Court noted in the contract of sale an agreement by Embassy not to compete for ten years and to attempt to have former producers either join the cooperative or ship to another market. Moreover, the Court considered a history of rivalry between Embassy and the cooperative, the "disruptive" competitive practices of Embassy, and the overvalued price paid for the acquisition. The cooperative defended this charge by pointing to the "necessary contracts and agreements" clause of the Capper-Volstead Act, therefore claiming exemption from the Sherman Act. The trial court, maintaining its distinction between activities of agricultural cooperatives alone and the activities of cooperatives and non-producers, held the conduct unlawful. Affirming,

that cooperatives could be liable for "competition-stiffling practices" under section 1 of the Sherman Act,[142] the Court, in reversing the dismissal of the section 2 charge, refused to find that Congress intended immunity from section 2. Moreover, having already held that section 6 of the Clayton Act does not manifest an intention to exempt completely labor unions from the antitrust laws,[143] the Court found no congressional purpose to grant broader immunity to agricultural cooperatives. Rather, the effect of section 6 was stated to be that "a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carrying out *the legitimate objects* thereof,' but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will."[144] The Court viewed the Capper-Volstead Act as both an extension of section 6 to capital stock agricultural cooperatives and an inclusion within section 6's "legitimate objects" of " 'collectively processing, processing, preparing for market, handling, marketing' products through common marketing agencies and the making of 'necessary contracts and agreements to effect such purposes.' "[145] The philosophy of the Acts was said to be "that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage — and responsibility — available to businessmen acting through corporations as entities."[146] Thus, while a purpose was found in the Capper-Volstead Act "to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws,"[147] the Court did not see "a congressional desire to vest

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the Supreme Court held "that the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors." 362 U.S. at 472.

142 *Id.* at 463 (citing United States v. Borden Co., 308 U.S. 188 (1939)).

143 *Id.* at 464-65 (citing Allen Bradley Co. v. Local Union No. 3, I.B.E.W., 325 U.S. 797 (1945), Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), and United States v. Hutcheson, 312 U.S. 219 (1941)).

144 362 U.S. at 465-66 (emphasis in original).

145 *Id.* at 466.

146 *Id.*

147 *Id.*

cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers."[148]

Judicial interpretation of section 6 of the Clayton Act and sections 1 and 2 of the Capper-Volstead Act leaves no doubt that the antitrust exemption for agricultural cooperatives is not absolute. Rather, those acts are construed as only allowing farmers — themselves individual businessmen — to join together in selling their produce. Without the Clayton and Capper-Volstead Acts, such collective activity would be prohibited as a conspiracy in restraint of trade. Beyond the exercise of its "legitimate objects," however, an agricultural cooperative presently may not act without violating the antitrust laws; necessarily forbidden are predatory and "competition-stifflling practices." As previously noted,[149] H.R. 7597 may be construed as legitimating predatory practices such as boycotting and blacklisting — activities which pervert and destroy competition on the merits. Further, the bill is interpreted as authorizing the use of full requirements contracts — themselves a possible means of stiffling competition. Unlike predatory practices, however, full requirements contracts may benefit an economic system and therefore suffer no per se rule of antitrust prohibition. Such ambivalence in economic characterization requires further examination of the ramifications of the bill's use of these contracts in light of the antitrust laws.

B. *Full Requirements Contracts*

Section 3 of the Clayton Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.[150]

148 *Id.* at 466-67.
149 See text accompanying notes 81-95, *supra.*
150 15 U.S.C. § 14 (1970).

The reach of this prohibition includes full requirements contracts because they necessarily prevent buyers from purchasing the goods of the seller's competitors.[151] Unlike the usual "tying" arrangement,[152] requirements contracts may have value for sellers other than the limitation of competition through exercise of market power.[153] In *Standard Oil Co. v. United States* the Court recited the potential benefits:

> In the case of the buyer, [requirements contracts] may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and — of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified — offer the possibility of a predictable market . . . . They may be useful, moreover, to a seller trying to establish a foothold against the counter-attacks of entrenched competitors.[154]

These possible benefits are countered by potential harms to competition, however, leading in part to the enactment of section 3.[155] The injurious effects have been expressed in terms of a "clog [on] competition in the channels of distribution"[156] and as increased "barriers to entry."[157] Although empirical data is lacking, the nature of the injury to competition can be understood "by applying rudimentary logic":[158]

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151 Standard Oil Co. v. United States, 337 U.S. 293, 297 (1949); United Shoe Machinery Corp. v. United States, 258 U.S. 451, 457 (1922); ATT'Y GEN.'s REP., *supra* note 130, at 139; Lockhart and Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 914 (1952); Kessler and Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 24 (1959).

152 A definitive explanation of tying arrangements is found in Turner, *The Validity of Tying Arrangements*, 72 HARV. L. REV. 50 (1958).

153 Standard Oil Co. v. United States, 337 U.S. 293, 306 (1949); ATT'Y GEN.'s REP., *supra* note 130, at 145.

154 Standard Oil Co. v. United States, 337 U.S. 293, 306-07 (1949).

155 ATT'Y GEN.'s REP., *supra* note 130, at 138-39.

156 *Id.* at 145; *see* Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949).

157 Kessler and Stern, *supra* note 151, at 18.

158 Bok, *The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act*, 1961 SUP. CT. REV. 267, 272 (1961).

> To the extent that a supplier blankets the market with outright exclusive arrangements or requirement contracts of excessive duration, the opportunity of rivals to compete in sales to the public is jeopardized. Whenever a seller through preempting access to consuming markets unduly restricts his rivals' opportunities to compete, the potential impairment of the competitive process or tendency to monopoly readily appears.[159]

Moreover, the effect of requirements contracts will not be felt just by those in actual competition with the supplier. Preclusion of the existing channels of distribution through use of full requirements contracts creates barriers to the entry of additional suppliers in the market:

> Barriers to entry can also be raised by forward integration which raises the distribution costs of potential competitors. Preemption of the choice outlets imposes on the prospective entrant the high cost of developing his own outlets — a fixed outlay — or else the choice of using inferior outlets which entail higher variable costs.[160]

A further consequence of requirements contracts, subverting a seller's competitors' ability to compete, is a result of the benefits said to accrue from such contracts. To the extent that full requirements contracts give market stability and protection against price fluctuations to those so contracting,[161] the fluctuations and unpreditacability faced by competitors are increased. In other words, "[i]f total industry sales fluctuate widely, reserving the stable customers for [those sellers party to requirements contracts] tends to aggravate the instability confronting [their] rivals."[162] This proportionate increase in fluctuating demand increases the risks faced by the remainder of the industry, thereby increasing the barriers to new entry.[163]

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159 ATT'Y GEN.'S REP., *supra* note 130, at 145-46.

160 Kessler and Stern, *supra* note 151, at 18; *see* Lockhart and Sacks, *supra* note 151, at 922.

161 These market factors were viewed as benefits of full requirements contracts by the Court in Standard Oil Co. v. United States, 337 U.S. 293, 306-07 (1949).

162 P. AREEDA, ANTITRUST ANALYSIS 488 (1967).

163 Faced with an increase in risk and with all other factors remaining constant, a new entrant, before entering the market, will require the presence of greater profits than would be required in the absence of this additional risk.

Because full requirements contracts may give rise to both economic benefit and competitive harm, section 3 of the Clayton Act only prohibits those arrangements where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[164] Cases involving section 3 have therefore focused, in part, on the portion of the relevant market foreclosed by operation of these contracts.[165]

The harm to competition resulting from foreclosure of substantial portions of a particular market through requirements contracts is reflected in the cases involving agricultural cooperatives. In *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*[166] plaintiff sought both damages for and an injunction against the activities of a milk producer cooperative alleged to be in violation of the Sherman and Robinson-Patman Acts. The activities included an attempt to force the use of a full requirements provision in contracts between the producer cooperative and milk processors in the St. Louis area. Controlling 55 to 60 percent of the raw milk supply in the area, the cooperative pressured the dairies through discriminatory and predatory pricing tactics and acquisitions of competing processing plants. Looking to *United States v. Aluminum Co. of America*,[167] the court stated that "when a firm holds monopoly power, any use of that monopoly power to increase and further its power, or to maintain it, when those actions are not inevitable but are consciously done to increase or preserve the power constitutes monopolizing."[168] Noting that "[t]he Capper-Volstead exemption from the antitrust laws does not apply to actions of an agricultural cooperative with respect to non-cooperative corporations or individuals,"[169] the court granted both an award of damages and an injunction. Whether the injunction included the use of full requirements contracts is un-

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164 *See* ATT'Y GEN.'S REP., *supra* note 130, at 138.

165 *E.g.*, Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327-29 (1961); Standard Oil Co. v. United States, 337 U.S. 293, 308, 314 (1949).

166 241 F. Supp. 476 (E.D. Mo. 1965).

167 148 F.2d 416 (2d Cir. 1945) (decided under a certificate from the Supreme Court).

168 241 F. Supp. at 485.

169 *Id.* at 486 (citing Maryland & Virginia Milk Producers Ass'n, 362 U.S. 458 (1960)).

clear;[170] however, the language used in discussing *Alcoa* logically reaches such use by a cooperative already controlling a substantial share of the market.

North Texas Producers Association v. Metzger Dairies, Inc.[171] is a similar case. There plaintiff sought treble damages for injury allegedly caused by a milk cooperative's violations of section 2 of the Sherman Act. The cooperative, already controlling 85 to 90 percent of the raw milk marketed in the Dallas-Fort Worth area, sought contractually to require plaintiff to agree not to purchase milk from non-cooperative producers without the approval of the cooperative. When plaintiff refused to agree to the contract, the cooperative boycotted grocers handling the plaintiff's milk. The court, finding it a settled principle that "farmers may act together in a cooperative association and the *legitimate objects* of mutual help may be carried out by the association without contravening the antitrust laws, but that otherwise, the association acts as an entity with the same responsibility under section 2 of the Sherman Act as if it were a private business corporation,"[172] affirmed the jury finding of a section 2 violation and the treble damage award of $1,095,000. As in *Bergjans,* the holding does not specifically address full requirements contracts but rather reaches the means used to coerce their use.

A clearer statement of the prohibition of full requirements contracts is found, however, in the cases arising out of the Fishermen's Collective Marketing Act.[173] In *Manaka v. Monterey Sardine Industries, Inc.,*[174] plaintiff sued to recover treble damages

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170 The court's opinion did not include the language of the injunction sought.

171 348 F.2d 189 (5th Cir. 1965).

172 *Id.* at 194 (emphasis of the court) (citing Maryland & Virginia Milk Producers Ass'n, 362 U.S. 458 (1960)).

173 48 Stat. 1213 (1934); 15 U.S.C. 521 (1970). The act is almost identical to the Capper-Volstead Act, an identification explained by the House report for the Fisheries Act:

> [The purpose of the Fisheries Act is] to provide for the fishery industry cooperative associations such as are provided for farmers by the Capper-Volstead Act . . . . This bill is identical with that act except that this bill applies to producers of aquatic products and not to farmers.

H.R. REP. No. 1504, 73d Cong., 2d Sess. 1 (1934). This similarity has been noted by the courts. *E.g.,* Hinton v. Columbia River Packers Ass'n, 131 F.2d 88 (9th Cir. 1942).

174 41 F. Supp. 531 (N.D. Cal. 1941).

for his preclusion from fulfilling a fishing contract. Defendant was a cooperative association of fishermen who had contracted with the area's canneries to supply all of their requirements of sardines. Allocation of fish to the canneries was accomplished by the cooperative's assignment of the catch of both members and non-members. Without this assignment, the canneries were contractually prohibited from buying sardines from non-members of the cooperative. The court found that "[t]he evidence indicated that by virtue of these contracts and its relations with the unions, the organization does exercise effective monopolistic control over the business and over all fish caught . . . in the vicinity."[175] Although noting the inclusion of the cooperative as a marketing agency within the terms of the Fishermen's Collective Marketing Act, the district court concluded that plaintiff had been prevented from fishing and marketing his fish; therefore the court granted the recovery.

A more recent case is *Gulf Coast Shrimpers and Oysterman's Association v. United States.*[176] There appellants sought reversal of their conviction for engaging in a combination or conspiracy in restraint of trade in violation of the Sherman Act. Appellants were an association of shrimp and oyster fishermen and several of its officers. The cooperative had contracts with twenty-two shrimp and oyster packers and canners which required the packers to purchase all catches tendered by Association fishermen. Appellants asserted that "the district court erred in refusing to submit to the jury the question of whether the actual activities of the Association and its members were within legal obligations permitted by Sec. 1 of the Fishermen's Collective Marketing Act. . . ."[177] The Fifth Circuit responded by stating that "[i]n its price-fixing, the Association exceeded any possible privilege or exemption granted by the Fishermen's Collective Marketing Act when it undertook not simply to fix the prices demanded by its members, but also to exclude from the market all persons not buying and selling in accordance with its fixed prices."[178] The conviction was affirmed.

175 *Id.* at 534.
176 236 F.2d 658 (5th Cir. 1956).
177 *Id.* at 664.
178 *Id.* at 665.

A third case considering full requirements contracts is *Hinton v. Columbia River Packers Association, Inc.*[179] Appellants were members of an association of fishermen which had sought to require the appellee processing corporation to purchase its full supply of fish from the association. The court, in affirming the lower court's injunction, found that *United States v. Borden Co.* controlled the question of whether the association was exempt from the antitrust laws. Further, "[a]ppellants, by their combination, have acquired the power to fix the prices of fish and control of the production thereof which deprives consumers of the advantages which accrue to them from free competition in the market."[180] The court saw this situation as a violation of the Sherman Act.

On the other hand, some cases[181] do not condemn agricultural cooperatives' use of full requirements contracts. In *Maryland & Virginia Milk Producers Association v. United States*,[182] convictions were sought against a milk producer cooperative, one of its officers, and seven dairies-distributors for violation of section 3 of the Sherman Act. The indictments charged that the dairies had contracted to buy their full requirements of raw milk from the cooperative to the extent that the cooperative could supply them. The use of full requirements contracts and the classification of milk into various price categories according to its use was said to create "a rigid and artificial pricing structure in the sale of fluid milk without regard for the normal forces of competition."[183] The cooperative supplied 80 percent of the milk sold in the Washington area but because of the district court's acquittal of five of the seven dairies, the court of appeals only considered contracts

179 131 F.2d 88 (9th Cir. 1942).

180 *Id.* at 89.

181 In addition to the case discussed in the text, the Federal Trade Commission, in an action under section 5 of the Federal Trade Commission Act, has stated without elaboration that the practice of restricting the handlers with whom a cooperative has contracts in the handling and processing of fruit grown by nonmembers is within the immunity granted citrus fruit growers by the Capper-Volstead Act. Florida Citrus Mutual, 53 F.T.C. 973, 1010 (1957).

182 193 F.2d 907 (D.C. Cir. 1951).

183 *Id.* at 911. These two elements of the alleged violation—the full supply contracts and the utilization-classification pricing arrangements—were combined in the court's consideration.

which involved 13.8 percent of the area's milk.[184] The court noted that the full requirements contract contained no prohibition against purchases from non-cooperative producers in the event the cooperative could not supply the requirements of the dairies. Also, in the face of war-created excess demand, the cooperative serviced the area by seeking outside milk and obtaining it for the distributors.[185] Working from the principles "that 'full supply contracts' are illegal when made for the purpose of eliminating and suppressing competition" and that "a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of milk is . . . illegal,"[186] the court found that the record did not contain the proof necessary to convince the trier beyond a reasonable doubt of the illegality of the contracts. Because the holding depends on the failure of proof, cooperatives do not view the case as strong support for the legality of full supply contracts.[187]

In summary, the cases arising under both the Capper-Volstead and Fishermen's Collective Marketing Acts allow cooperatives the same use of full requirements contracts as is granted other business entities. Application of the antitrust laws to agricultural cooperatives in order to preclude full requirements contracts which may "substantially lessen competition or tend to create a monopoly" is therefore consistent with the Supreme Court's interpretation of the scope of the cooperatives' antitrust exemption. The remaining consideration is the effect of H.R. 7597 on this limited antitrust exemption.

C. *Full Requirements Contracts as Used in H.R. 7597*

H.R. 7597 places full requirements contracts between qualified bargaining associations and handlers beyond the reach of the antitrust laws. The language seeking this result is not explicit, however, and, as previously noted,[188] the operation of the bill can only

184 At the time of the indictment, full supply contracts between the cooperative and the dairies in the Washington area involved 22 percent of the milk and milk products sold there. *Id.* at 917 n.1 (Fahy, J., dissenting).

185 A service, the court points out, performed without charge. *Id.* at 912.

186 193 F.2d at 915.

187 *See* Lemon, *supra* note 7, at 520.

188 See text accompanying notes 52-67, *supra.*

be understood by juxtaposing several of its sections. One such construction was made by Professor Turner, former head of the Antitrust Division of the Department of Justice: "[the bill] would appear to validate exclusive requirements contracts on a much wider scale than existing law would permit."[189] Implicitly recognizing the reach of the bill, its proponents reply:

> H.R. 7597 recognizes the established practice of negotiating full supply contracts between qualified associations and handlers. It does not require such contracts. Only when an association can supply the full needs of a handler and the handler wishes to have such a contract would one be negotiated.[190]

That the bill only grants the full requirements contract exemption to associations which can supply the full needs of the handlers does nothing, of course, to mitigate the anti-competitive effects.

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189 Professor Turner's construction is as follows:

> [Section 106(c)] obviously does not by its terms provide an additional exemption beyond that given by existing legislation. However, it may be taken to imply a further exemption: While put negatively, it seems to express a favorable view of exclusive requirements contracts; moreover, the provision would otherwise seem wholly pointless, since nothing in the bill in any way suggests a prohibition of such contracts.
>
> [S]imilarly, Section 106(e), making it unlawful for a handler to purchase a product [from] other producers under terms more favorable than those negotiated with a qualified bargaining association, does not by its terms grant a broader antitrust exemption, as prohibiting purchase under terms less favorable would clearly do. But other provisions of the proposed bill clearly point in the direction of broadening the right of farm bargaining cooperatives to obtain exclusive requirements contracts.
>
> Section 106(d) makes it unlawful for any handler to negotiate with other producers so long as it is negotiating with a qualified bargaining association able to supply all or a substantial proportion of the requirements of such handlers for such products. This provision not only seems to validate requirements contracts, but it also quite clearly would put nonmembers at a serious economic disadvantage at the outset, and thus tend to force them into the association.
>
> Finally, Section 114 . . . . [t]aken in conjunction with the other provisions I have described . . . would appear to validate exclusive requirements contracts on a much wider scale than existing laws would permit.

Hearings on S. 1775 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry, 92d Cong., 1st Sess. (1971), at 306-07 (remarks of Prof. Turner).

190 Lauterbach, *supra* note 66, at 53. For a discussion of the extent to which such contracts are required by H.R. 7597, contrary to the assertions of Lauterbach, see text accompanying notes 52-80, *supra*.

The bill provides, in other words, that full requirements contracts can only be used when they are most effective in precluding other producers. Here then is the anti-competitive crunch of the proposal. In order to be accorded the antitrust exemption created by H.R. 7597, an association of producers must be qualified — a status requiring that the association represent a sufficient number of producers and a sufficient volume of an agricultural commodity to make it an effective agent in bargaining with handlers. No percentage of market control is stipulated in the bill; however, one spokesman for agricultural cooperatives has looked to a figure of 60 to 70 percent of the product market as necessary to be able to effectively bargain.[191] Therefore, a qualified association, representing 60 to 70 percent of the product market, will be permitted to negotiate full requirements contracts with handlers buying from that market — a condition almost certainly in violation of the present application of the antitrust laws.[192]

The policy reasons for the present prohibition of full requirements contracts which foreclose substantial portions of relevant markets are evidenced by the possible ramifications of H.R. 7597. Production of agricultural commodities is characterized by its surplus supply.[193] Given that supply exceeds demand, qualified bargaining associations, insofar as they can force use of full requirements contracts, can foreclose non-members' opportunities to sell. The foreclosure will be significant. Further, in foreclosing the opportunity to sell in the relevant market to buyers with predictable demand, H.R. 7597's allowance of full requirements contracts may greatly increase the instability of market conditions faced by non-member producers, thereby increasing their risks. To escape these deleterious effects, independent producers will have to join the producer associations.[194] However, this result may

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191 Lemon, *supra* note 7, at 511 n.40.

192 Turner, *supra* note 189, at 305 ("A farm bargaining cooperative's right to enter into exclusive requirements contracts with handlers is no greater than the right of any private business corporation: while the law on requirements contracts is somewhat uncertain, it would almost certainly be unlawful for a bargaining cooperative accounting for a large portion of supply to foreclose its competitors from a large share of the market.")

193 R. CAVES, *supra* note 3, at 82.

194 For an example of an instance where exemption from the antitrust laws has been used to force membership in the exempted organization, see 2 L. LOSS, SE-

be the lesser evil faced by a producer wishing to remain independent. Professor Wallace Barr points out:

> The production response elicited by a substantial increase in farmers' prices and income could prove a troublesome pitfall . . . . Where a production response erodes the original price gains, a need would arise for mechanisms by which to store or divert short-term surpluses, and possibly to control output and/or limit entry for the longer run. The quotas, allotments, and other features of production control would influence the level and distribution of income among present producers and determine entry requirements for new producers.[195]

Faced with chronic surplus, the agricultural cooperatives may decide to limit their membership to those producers representing produce sufficient to meet demand, therefore severely restricting independent producers' ability to compete.[196] Thus, this grant of antitrust exemption for cooperatives is not consistent with the repeated assertions[197] that under H.R. 7597 producers need only

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CURITIES REGULATION 1369-70 (2d ed. 1961) ("[Sections 15A(i),(n) of the Securities Exchange Act of 1934] afford the [National Association of Securities Dealers, Inc.] an exemption from the antitrust laws . . . [and] according to the Commission, make it 'virtually impossible for a dealer who is not a member of the NASD to participate in a distribution of important size.' ") The importance of the NASD (and thus the reason for the coercion) lies in the governmental reliance on the organization to provide regulation of the ethics of the securities dealers industry. *See id.* at 1361.

195 W. Barr, *Bargaining in Perspective—A Summary*, in BARGAINING IN AGRICULTURE 45 (1971).

196 The presence of independent producers who are willing to underprice the cooperatives may cause economic dislocation and major reorganization in the handling industry as handlers attempt to avoid the restrictions of H.R. 7597. For example, because handlers have a section 106(a) bargaining duty only if they have dealt with producers of a cooperative in two of the previous five years, outsiders will have an incentive to begin handling the independents' products. The new entrants would have no bargaining obligations until some of their sources joined cooperatives. These handlers would be free to purchase the competitively-priced products of independent producers, thereby undercutting the established dealers and processors. Of course, the costs of relocating capital and of reorganizing existing businesses would mitigate this effect.

197 This expression of voluntariness is found in the preamble of the bill and has been repeated by proponents of the legislation. *E.g.*, Bunje, *supra* note 41, at 38 ("The so-called 'independent producer' will go totally unaffected unless he wants to join a cooperative bargaining association. If he desires, he is perfectly free to continue to deal with the handler on his own."); Lauterbach, *supra* note 66, at 55 (". . . Farm Bureau seeks only equity in bargaining—not politically imposed compulsion. [H.R. 7597] is no radical proposal to abrogate or destroy the individual rights of any farmer or handler.").

join a cooperative voluntarily. With membership in a cooperative as the exclusive determinant of a producer's continued ability to market his produce, no consideration is given to efficiency or equity. To the extent that power over terms of sale are concentrated in one bargaining unit rather than in many and that substantial portions of the market are foreclosed by full requirements contracts, thereby providing insulation from the competition of independent producers, monopoly power is achieved by the qualified bargaining associations. Monopoly power means the ability to raise prices above those which would result in a competitive market; therefore general misallocation of resources will result.[198] Such a consequence runs squarely in the face of the policy of section 3 of the Clayton Act and the antitrust laws generally. Given that augmentation of farmer income is the primary goal of H.R. 7597,[199] the results of granting antitrust exemption for full requirements contracts indicate that the legislation is an excessively costly vehicle to achieve that goal. Hopefully, those considering this legislation will heed the urgings of Assistant Secretary of Agriculture Lyng to give serious attention to the antitrust exemption of the bill:

> Agricultural cooperatives already have antitrust exemption for their legitimate cooperative activities. To broaden this for bargaining cooperatives raises important questions which may, in the long run, adversely affect producers, handlers, and consumers alike.[200]

The focus of Lyng's first sentence is particularly important in considering the proposed agricultural bargaining bill. Insofar as agricultural cooperatives seek "legitimate objects," they do not presently violate the antitrust laws. Full requirements contracts may, in some instances, be expressive of legitimate objects for all business entities; this is the teaching of *Tampa Electric*.[201] Agricultural cooperatives, under the present antitrust laws, are able to use full requirements contracts to achieve the legitimate benefits of such usage. Therefore, the only effect of H.R. 7597 with

198 R. CAVES, *supra* note 3, at 114.
199 Lyng, *supra* note 29, at 19.
200 *Id.* at 21.
201 365 U.S. 320 (1961).

regard to full requirements contracts is the authorization of their usage to obtain a heretofore illegitimate objective — the substantial lessening of competition. Given this ascertainable purpose and the likely effects of allowing antitrust exemption for the use of full requirements contracts by agricultural cooperatives, Congress should reject the statutory scheme expressed in H.R. 7597.

III. The Economic Justification of H.R. 7597

Even if H.R. 7597 did not have the objectionable features which have been exposed in the preceding two sections (*i.e.*, the misuse of collective bargaining and the violation of antitrust policy), it would still be a poor statute because its basic premises have no economic justification. For agricultural collective bargaining to be successful in raising farm income, at least one of the following economic results must occur: (a) associations of farmers increase the efficiency of marketing or processing, (b) farmers acquire "excess" profits from the handlers and processors, or (c) consumers pay higher prices for agricultural products.[202] Of these three, proposition (a) is defensible under an economic system based on competition. An economic structure benefits more from its available resources if they are efficiently used. Results (b) and (c) require separate social policy decisions. Result (b) involves an income redistribution from handlers to farmers and result (c) involves a transfer from consumers to farmers.

If cost-saving efficiencies are possible from marketing or processing[203] by associations of producers, that result would benefit both farmers and the nation as a whole.[204] However, the attainability of an increase in efficiencies is not certain.[205] The rising marketing costs of farm products in recent years are not caused

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202 M. Snodgrass & L. Wallace, *supra* note 1, at 474.

203 Cooperative marketing may stimulate the development of new products with resulting marketing advantages. For example, the formation of Sunkist Growers association allowed growers to process fresh citrus fruits for juices and other secondary uses, thereby giving them the ability to withhold otherwise-perishable products from the market if there was a surplus of fresh fruit. See *Agricultural Cooperatives, supra* note 114, at 374.

204 *See* M. Snodgrass & L. Wallace, *supra* note 1, at 475.

205 *See* G. Hallett, The Economics of Agricultural Policy 7, 169 (1968); M. Snodgrass & L. Wallace, *supra* note 1, at 173.

by inefficiency; they are due primarily to increased consumer demand for services in connection with agricultural production.[206] Efficiencies from combined marketing or processing of the products of individual farmers are already possible under existing agricultural cooperative law. If cost-savings can be made by combined marketing or processing, then presumably existing cooperatives should be able to attract members without new legislation.

To the extent that transferring the operations of middlemen to cooperatives fails to create cost-saving efficiencies, farmers would not be benefitted by conducting those operations unless handlers have profits in excess of normal equity return.[207] The existence of excess handlers' profits has long been alleged by proponents of agricultural collective bargaining legislation.[208] That such profits exist, however, is not clear.[209] In any event, excess profits of some handlers are not a sufficient justification for giving all associations of farmers monopoly power which is exempt from the antitrust laws.[210]

To the extent that agricultural collective bargaining increases farmers' returns over the reduction of any excess profits of handlers or attainment of efficiencies, prices to consumers must increase.[211] Any price increase may cause a decline in consumer purchases.[212]

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206 *See* M. SNODGRASS & L. WALLACE, *supra* note 1, at 174-75.

207 "What does this normal return amount to in practice? . . . Although we cannot identify *one* long-term interest rate in the complex of capital markets, for the private sector of the economy the range of 5 to 6 percent would seem appropriate." R. CAVES, *supra* note 3, at 106.

208 "We take judicial knowledge of the history of the country and of current events, and from that source we know that conditions at the time of the enactment of the Bingham [Co-operative Marketing] Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the purchasing price of the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the farmer obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and final consumer injuriously operated upon both classes and fattened and flourished at their expense." Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op Ass'n, 208 Ky. 643, 649, 271 S.W. 695, 698 (1925), *aff'd*, 276 U.S. 71 (1928); *cf.* Note, *Cooperatives —A Privileged Restraint of Trade*, 23 NOTRE DAME LAW. 110, 118-19 (1947).

209 *See* Moore, *Bargaining Power Potential in Agriculture*, 50 AM. J. OF AGRIC. ECON. 1051 (1968); *cf.* G. HALLET, THE ECONOMICS OF AGRICULTURAL POLICY 161-62 (1968).

210 *But see Agricultural Cooperatives, supra* note 114, at 430 n.1.

211 See note 202 *supra* and accompanying text.

212 *Cf.* M. SNODGRASS & L. WALLACE, *supra* note 1, at 268.

The amount of this decline will depend upon the consumers' readiness to forego the product and upon the availability of substitute products. Any artificial increase in return to farmers, however, will cause them to increase production of that product,[213] either by shifting resources from other production or by investing new resources. The combined effect of a decrease in demand but increase in supply would create a commodity surplus. Therefore, if the political decision is made that the social benefits of an increase in farmers' income outweigh the economic losses from misallocation of demand and supply, then the problem of commodity surplus must still be met at the public or private level.[214]

IV. Conclusion

Those individuals wise in the lessons of Greek mythology may view the present task of solving the farm problem as similar to that faced by Sisyphus; the would-be problem solver both climbs the mountain of surplus commodities and pushes the rock of excessive resources in agriculture. This Note, while recognizing the problem, concludes that H.R. 7597, rather than solving the plight of the modern day Sisyphus, will instead increase the misallocation of resources within the farm sector. Three objections to H.R. 7597 are posited here. First, use of labor law concepts in establishing agricultural bargaining legislation begs the question of the suitability *vel non* of such a statutory transplant. Since farmers are capitalists rather than laborers, the bill's objective of greater farmer income will not be realized. Further, the use of the labor scheme in the agricultural bargaining context may visit coercive power in the hands of the cooperatives — power which can be directed against the independent producers as well as the purchasing handler. Second, grant of further antitrust exemption to cooperatives for heretofore illegal practices will create an agricultural marketing system based on monopoly power rather than efficiency or equity. Particularly, this Note criticizes the bill's authorization of full requirements contracts. And third, the foun-

213 *Id.* 292.

214 "To exercise a large degree of bargaining power will require effective control over a major portion of the supply, which is difficult for nearly all agricultural products." *Id.* 476.

dation of H.R. 7597 must be the belief that consumers should pay more for their food than the price otherwise dictated by a competitive market. Such a policy of robbing Paul to pay Peter will fail because of the supply elasticities faced by farmers. In summary, this Note urges rejection of H.R. 7597 and its legislative progeny. Sisyphus suffers enough under the present load of agriculutral problems — any greater burden would be intolerable.

*Dale H. Oliver**
*Stephen J. Snyder**

APPENDIX

H.R. 7597

TITLE I AGRICULTURAL MARKETING AND BARGAINING

SECTION 101. LEGISLATIVE FINDINGS AND PURPOSE

Congress has already found that because agricultural products are produced by numerous individual farmers, the marketing and bargaining position of individual farmers will be adversely affected unless they are free to join together voluntarily in cooperative organizations as authorized by law. Congress hereby finds, further, that membership by a farmer in a cooperative organization can only be meaningful if a handler of agricultural products is required to bargain in good faith with an agricultural cooperative organization as the representative of the members of such organization who have had a previous course of dealing with such handler. The purpose of this title, therefore, is to provide standards for the qualification of agricultural cooperative organizations for bargaining purposes, to define the mutual obligation of handlers and agricultural cooperative organizations to bargain with respect to the production, sale, and marketing of agricultural products and to provide for the enforcement of such obligation.

SECTION 102. SHORT TITLE

This title shall be known and may be cited as the "National Agricultural Marketing and Bargaining Act of 1971."

SECTION 103. DEFINITIONS

When used in this title—

(a) "Qualified association" means an association of producers accredited in accordance with section 105 of this title.

(b) "Association of producers" means any association of producers of agricultural products engaged in marketing, bargaining, shipping, or processing as defined in section 15(a) of the Agricultural Marketing Act of 1929, as amended (49 Stat. 317; 12 U.S.C. 1141(a)), or in section 1 of the Act entitled "An Act to authorize association of agricultural producers" approved February 18, 1922 (42 Stat. 388; 7 U.S.C. 291).

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*Members of the Class of 1972 at the Harvard Law School.

(c) "Board" means the National Agricultural Bargaining Board provided for in this title.

(d) "Handler" means any person other than an association of producers engaged in the business or practice of (1) acquiring agricultural products from producers or associations of producers for processing or sale; (2) grading, packaging, handling, storing, or processing agricultural products received from producers or associations of producers; (3) contracting or negotiating contracts or other arrangements, written or oral, with or on behalf of producers or associations of producers with respect to the production or marketing of any agricultural product; or (4) acting as an agent or broker for a handler in the performance of any function or act specified in (1), (2), or (3) above.

(e) "Person" includes one or more individuals, partnerships, corporations, and associations.

(f) "Producer" means a person engaged in the production of agricultural products as a farmer, planter, rancher, poultryman, dairyman, fruit, vegetable, or nut grower.

SECTION 104. NATIONAL AGRICULTURAL BARGAINING BOARD

(a) There is hereby established in the Department of Agriculture a National Agricultural Bargaining Board, which shall administer the provisions of this title.

(b) The Board shall consist of three members who shall be appointed by the President with the advice and consent of the Senate.

* * *

(f) The Board shall have authority from time to time to adopt, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary or appropriate to carry out the provisions of this title.

SECTION 105. QUALIFICATION OF ASSOCIATION OF PRODUCERS

(a) Only those associations of producers that have been qualified in accordance with this section shall be entitled to the benefits provided by this title.

(b) An association of producers desiring qualification shall file with the Board a petition for qualification. The petition shall contain such information and be accompanied by such documents as shall be required by the regulations of the Board.

(c) The Board shall provide for a public hearing upon such petition. The Board shall qualify such association if based upon the evidence at such hearing the Board finds:

(1) that under the charter documents or the bylaws of the association, the association is directly or indirectly producer owned and controlled;

(2) the association has contracts with its members that are binding under State law;

(3) the association is financially sound and has sufficient resources and management to carry out the purposes for which it was organized;

(4) the association represents a sufficient number of producers and/or a sufficient quantity of agricultural products to make it an effective agent for producers in bargaining with handlers; and

(5) the association has as one of its functions acting as principal or agent for its producer-members in negotiations with handlers for prices and other terms of contracts with respect to the production, sale, and marketing of their product.

* * *

(f) If a qualified association ceases to maintain the standards for qualification set forth in paragraph (c) of this section the Board shall, after notice and hearing, revoke the qualification of such association.

SECTION 106. BARGAINING

(a) As used in this title, "bargaining" is the mutual obligation of a handler and a qualified association to meet at reasonable times and negotiate in good faith with respect to the price, terms of sale, compensation for commodities produced under contract, and other contract provisions relative to the commodities that such qualified association represents and the excution of a written contract incorporating any agreement reached if requested by either party. Such obligation on the part of any handler shall extend only to a qualified association that represents producers with whom such handler has had a prior course of dealing. Such obligation does not require either party to agree to a proposal or to make a concession.

(b) A handler shall be deemed to have had a prior course of dealing with a producer if such handler has purchased commodities produced by such producer in any two of the preceding five years.

(c) Nothing in this Act shall be deemed to prohibit a qualified bargaining association from entering into contracts with handlers to supply the full agricultural production requirements of such handlers.

(d) It shall be unlawful for a handler to negotiate with other producers of a product with respect to the price, terms of sale, compensation for commodities produced under contract, and other contract provisions relative to such product while negotiating with a qualified bargaining association able to supply all or a substantial portion of the requirements of such handler for such product.

(e) It shall be unlawful for a handler to purchase a product from other producers under terms more favorable to such producers than those terms negotiated with a qualified bargaining association for such product.

(f) Whenever it is charged that a qualified association or handler refuses to bargain as that terms is defined in paragraph (a) of this section, the Board shall investigate such charges. If, upon such investigation, the Board considers that there is reasonable cause to believe that the person charged has refused to bargain, in violation of this Act, that Board shall issue and cause to be served a complaint upon such person. The complaint shall summon the named person to a hearing before the Board or a member thereof at the time and place therein fixed.

(g) The person complained of shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise at the hearing and give testimony. In the discretion of the Board, or the member conducting the hearing, any person may be allowed to intervene to present testimony. Any hearing shall, insofar as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States.

(h) If, upon a preponderance of the evidence, the Board determines that the person complained of has refused to bargain, in violation of this title, it shall state its findings of fact and shall issue and cause to be served on such person an order requiring him to bargain as that term is defined in paragraph (a) of this section and shall order such further affirmative action, including an award of damages, as will effectuate the policies of this title.

(i) If, upon a preponderance of the evidence, the Board is of the opinion that the person complained of has not refused to bargain, in violation of this title, it shall make its findings of fact and issue an order dismissing the complaint.

(j) Until the record in a case has been filed in a court, as hereinafter provided in section 106, the Board may at any time, upon reasonable notice and in such manner as it deems proper, modify or set aside, in a whole or in part, any finding or order made or issued by it.

SECTION 107. ENFORCEMENT OF ORDERS AND JUDICIAL REVIEW

(a) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in

vacation, any district court of the United States, within any circuit or district, respectively, wherein the refusal to bargain occurred or wherein the person who engaged in such refusal resides or transacts business, for the enforcement of its orders made under section 105 and for appropriate temporary relief or restraining order. . . .

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(b) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the refusal to bargain was alleged to have occurred or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside.

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SECTION 113. SEVERABILITY

The provisions of this title are severable and if any provision shall be held unconstitutional or invalid by a court of competent jurisdiction the decision of such court shall not affect or impair any of the remaining provisions.

SECTION 114. ANTITRUST VIOLATIONS

The activities of qualified associations and handlers in bargaining with respect to the price, terms of sale, compensation for commodities produced under contract, or other contract terms relative to agricultural commodities produced by the members of such qualified associations shall be deemed not to violate any antitrust law of the United States. Nothing in this title, however, shall be construed to permit handlers to contract, combine, or conspire with one another in bargaining with qualified associations.

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BOOK REVIEW

THE POLICE AND THE PUBLIC. By *Albert J. Reiss, Jr.*,[1] New Haven: Yale University Press, 1971. Pp. 228. $8.95.

Reviewed by Andrew H. Cohn[2]

In plan and scholarship this book is a well balanced and comprehensive summary of the nature and processes of police-citizen encounters in metropolitan police departments. It is an important work and one that should be consulted by anyone concerned about improving police-community relations, increasing police protection and correcting abuses of police power.

The areas studied by Reiss and his assistants were pairs of high crime police precincts, predominently white and black, in Boston, Chicago, and Washington, D.C. The study concentrated on what Reiss calls "the policing of everyday life." For this Reiss and his coworkers examined foot patrolmen and mobile patrolmen in cruisers. There were 12 observers in each city with an equal number from law, law enforcement and social sciences.

The focus of the study was the "encounter": an interaction between police and citizens that took place on routine patrol while an observer was accompanying policemen. The encounters arose either from citizens calling the police and the policemen being dispatched from headquarters, or from citizens calling for help on the street, or from police officers' decisions to intervene. Only rarely were the observers able to speak with citizens after the encounter; hence the judgments about the legitimacy citizens accorded to police actions are based largely on inferences from arrest statistics, injuries to policemen, *etc.* In total the researchers reported on 5,360 mobilizations of the police, of which 28 percent involved no encounters with citizens.

Interestingly, over 80 percent of all mobilizations were initiated

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1 Professor of Sociology, Yale University.

THE POLICE AND THE PUBLIC is a compilation of the Terry Lectures delivered at Yale University. Citations to the book will be made by page number hereinafter.

2 V.O. Key, Jr., Fellow at the Joint Center for Urban Studies of the Massachusetts Institute of Technology and Harvard University, and candidate for the Ph. D. degree in Social Anthropology in the Department of Social Relations, Harvard University; B.A. 1966, University of Pennsylvania; M.A. 1970, Harvard University.

by private citizens who called the police headquarters on the telephone; these mobilizations resulted in a cruiser with one or two police being sent to the incident. Fourteen percent of the mobilizations stemmed from an officer's initiative in the course of his patrol; and only 5 percent of the mobilizations occured as a result of a citizen mobilizing an officer while he was on patrol. In sum, in the high crime areas of the three cities studied the mobilization of policemen on patrol was initiated nearly 87 percent of the time by citizens while the remainder was initiated by the officers themselves.[3] This indicates the considerable influence citizens hold over the effectiveness of policing and police protection of communities.

Three major relationships are suggested by this finding and are partly discussed by the author. (1) The degree of legitimacy citizens come to accord to police authority determines the rate of citizen-initiated mobilization. A lower rate of citizen mobilization will seriously impair police effectiveness. From the viewpoint of state legislative committees and city councils that are concerned with greater "productivity" from civil servants (and in the case of the police, more effective policing with the same manpower), a police department which does not receive whole-hearted support from a majority of citizens is very likely to be on a downward spiral of effective police protection. Reiss' data are not sufficient to indicate whether those citizens who actually mobilize police are also likely to be present in the encounter; nevertheless it is clear that in more than eight out of ten times a policemen comes into an encounter on the initiative of citizens and is thereby granted some *a priori* legitimacy to carry out his policing tasks. (2) The rate of citizen-initated mobilization is also determinative of the degree of police protection and is a useful source of information to urban administrators, city legislators and citizens concerned with "law and order." There is a tendency to confuse police presence with police protection; increasing the number of officers on patrol does not, as Reiss' study suggests, increase police effectiveness in halting crime (against property or the more frequent abuses arising from interpersonal hostilities) unless citizens provide the major input by the mobilization of the police officers. Citizens are, in a sense,

3 P. 11.

a widespread surveillance network providing police with most of their information.

Furthermore, there is a tendency among various urban constituencies to believe that the only antidote to crime is a vigilant police force. These groups are always ready to lobby for one or another form of proactive policing. They believe that police should "stop crime before it happens" by seeking out known criminals and others engaged in illegitimate activities.[4] But the effectiveness of such proactive policing is understandably bound to be elusive in light of the fact that officers *on their own initiative* account for less than one-fifth of all police mobilizations. Proactive policing may be appropriate to specific tasks within the entire purview of a police department's activities, such as a vice squad or a rackets squad to inhibit prostitution and break up gambling rings. But as other studies have shown there are other limitations (such as statutes prohibiting entrapment) on the ability of police in such units to carry out their proactive functions.[5] Proactive policing in high crime sections of urban areas is thus a poor strategy because it requires police departments both to find illegal actions and police them when police are, in fact, only effective in the latter function, and citizens far superior as "finders and mobilizers."

Proactive policing also has unanticipated secondary consequences that further inhibit the effectiveness of police officers. Dependent primarily on their own mobilizations, proactive units attempt out of necessity to elicit information from persons in the beats they are assigned to protect. This constraint often leads to police attempts to force citizens to provide information and to employ methods of dealing with citizens that are relatively harsh. Over time the treatment accorded citizens by proactive units, and especially the treatment of the citizens with some knowledge of the operations the police are assigned to prohibit, results in the citizens shunning any police contacts, further cutting off officers

4 Relatively homogenous ethnic enclaves in urban areas are particularly likely to have a strong sense of who the deviants and criminals are and a strong desire to root them out quickly. However, each ethnic area within a city is likely to have its own definition of its local bad element. *See* Erickson, *On the Sociology of Deviance,* in A. GOLDSTEIN & J. GOLDSTEIN, CRIME, LAW AND SOCIETY (1971). A possible deprivation of due process arises out of the vigorous action which local "moral entrepreneurs" demand.

5 *Cf.* J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966).

from channels of information and limiting the effectiveness of such units.

Reiss points out that all police units are open to subversion from within their ranks by officers knowledgable about illegal activities tolerating their existence and abetting their spread. Proactive units are especially vulnerable to this internal subversion because the activities they are mandated to stop are frequently lucrative to large numbers of people. Proactive units make themselves increasingly vulnerable to subversion as their citizen-contacts lessen. In order to demonstrate "proactive productivity" they must get information and this information can lead to *quid pro quo* trade-offs: information in exchange for protection.

Reiss points out, (3), that the mode of citizen initiation must be taken into account in structuring police activity. The dependence on the telephone suggests that those concerned with greater "police presence" should focus less attention on increased patrols and decentralized police headquarters in local communities. Since few citizens mobilized the police in person, and few of these in person mobilizations occurred through headquarters, the policies of "increase police presence" and more numerous local police headquarters are tangential remedies for achieving greater protection.

Reiss' data show that the tangled issues in the debates on public safety are not advanced by further calls for more police and more headquarters. Rather, actions which facilitate citizen inputs, and improvements in the communication network that receives these citizen inputs, would produce more beneficial and lasting results. Indeed, a major theme of Reiss' work is that police departments that function primarily by answering requests of citizens for assistance are more in accordance with the needs of a "civil society" than are police that operate primarily by police initiative. Moreover, his systemic analysis indicates that the increases in foot patrolmen or even in patrol cars in high crime areas do not effectively reduce crime. Contrary to much popular belief about the deterrent effect of police presence, Reiss shows that it is citizen initiated dispatches that lead to effective crime control.

Reiss also points out legal problems of decentralized law enforcement agencies that are subject to "community control." Different communities are very likely to insist on different levels

of law enforcement in different areas. They are likely to view certain outsiders as *a priori* suspicious and to seek prejudicial enforcement against non-residents of the community or non-members of the ethnic or racial enclave. Legal problems will arise over impartial and universal standards for police to judge illegal actions and to use their discretion to arrest and charge persons with crimes.

Citizens are, therefore, a major part of the criminal justice system not only as violators but also in the role of enforcers. This citizen role has been much neglected. Those examining the history of police departments have emphasized the steady increment in the formation of centralized police bureaucracies with increased power to seek out infractions of the law. Reiss cautions against confusing power delegated to police with their actual exercise of power. He points out that police are only the second from the bottom of the five level hierarchy of subsystems of criminal justice: the citizen subsystem, the police subsystem, the public prosecution subsystem, the misdemeanor and felony courts, and the appellate subsystem.

Each of these subsystems is formally granted jurisdiction over particular decisions. Each has two types of discretion it can exercise that are critical in the criminal justice process: (1) discretion over acceptable inputs; and (2) discretion over the transfer of various inputs to higher subsystems as outputs. In general, discretion can be specifically delegated or it can be unauthorized. The discretion exercised by the police subsystem in paticular is largely unauthorized. There are very few formal rules that specify how the police shall handle their actions in relation to other subsystems.[6]

The police are the primary recipients of inputs from the citizens. In addition, the police have control over these citizen inputs after they leave the police subsystem; the police still have some discretion over the disposition of a case when it is with the prosecutor and before the judge. For example, by withholding informa-

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6 P. 115.

Several articles have explored the fidelity with which the police subsystem applies the rules handed down by the appellate subsystem, *see, e.g.*, Wolfstone, *Miranda — A Survey of Its Impact*, 7 THE PROSECUTOR 26 (1971).

tion output the police can control the prosecutor's ability to develop a case. On their own, prosecutors do not have an organization geared to eliciting necessary information; they are dependent on the police. By withholding the output, the police are free from certain constraints that prosecutors or judges might impose on them. Reiss points out for example, that "the police need only conform to the rules of prosecutors and judges on matters it sends to them, but not in those matters it handles by internal means such as harrassment by refusal to arrest or book, or failure to request prosecution, thereby dropping charges."[7]

While other elements in the criminal justice system may be interested in articulating a system of abstract justice or prosecuting according to specific statutes, the police operate with other concerns uppermost. The police must deal with the problems of keeping order in public places, responding to mobilizations of citizens about criminal and noncriminal affairs, and catching those who violate the law. Reiss' findings indicate how strongly the actions of the police derive from their own central concerns regardless of competing demands that originate in other subsystems. If actions that are efficient for carrying out police tasks are at variance with the requirements of statute, and the police are challenged by citizens groups, they are able to hamper investigations of their own departments and protect their officers, both staff and line, from sanctions enforced by external systems.

The police are able to erect barriers that effectively prohibit information detrimental to their internal organization to get beyond the department. In certain matters the police are also in control of information even after it has passed to a higher level. The police still exercise discretionary control over cases in the prosecuting attorney's office, for example, because of their importance as witnesses. Police goals in particular instances are coextensive with those of the prosecuting attorney. When the police join with the prosecutor they are able to present a formidable threat to citizens charged with crimes. By forcing the defendant into bargaining for his plea, the prosecutor and the police achieve efficient resolution of a case from their point of view, and in so

7 P. 119.

doing they coopt the power of the court, depriving, in some ways, the citizens of an opportunity to defend themselves publicly.

Two opposing views are expressed for evaluation of police work. To assure effective functioning of the police, professionals and administrators in police departments must be in the position to decide about the quality of police work and to punish deviation from professional standards. This viewpoint sees the police department as the best judge of police officers' actions. Balanced against this viewpoint is a desire on the part of citizens to hold police officers accountable to the public for their actions toward citizens.

The problem of how to establish a workable form of accountability is a recapitulation of the problem of police discretion at its greatest remove. In fact, citizen demands for greater accountability derive primarily from their sense that police have exercised discretion improperly; Reiss documents that most complaints about the actions of police officers arise from police's discretion in choosing among force, threat, invoking of detention, *etc.* The police departments' reply to such complaints is that any review of professional discretion has to be performed by professionals, if the integrity of the police profession is to be protected. In charting a path for a civil police force, Reiss points out that a fundamental element of civil order is based on how officers treat citizens in encounters, and reciprocally, how citizens act toward officers performing their legal functions. The maintenance of civil order involves reciprocal obligations and sanctions for both the police and the citizenry. A police force that is permitted to use force indiscriminately will soon intimidate the citizenry and lose its legitimacy. In the same way, if citizens are not sanctioned and restrained from uncivil acts such as use of force against the police and other citizens, the system of law enforcement will ultimately degenerate into arbitrary behavior on the part of the police.

Since most police forces in the United States are based in local jurisdictions, it is local police who are called upon most often to maintain civil order in volatile issues. For example, though a national organization may spearhead a drive for a particular cause, the direct legal or institutional challenge is usually a local institution and the local police must bear the burden of confronting dissenters and keeping order. And the local police do *not* have the

option of not responding to requests for assistance.[8] It is difficult to establish clear standards to govern police actions by which to judge their behavior and to hold the police accountable. Lawmakers have frequently refrained from specifying in statutory form the procedures for police operations at the level of individual action. Even though several states have restricted the use of deadly force by police officers to felonies, most states have not.

"Police corruption" is an oft-repeated phrase, but beyond the phrase itself and the suggestion of bribery and payoffs and gangster influence, little has been reported about the systematic nature of this corruption. Reiss and his coworkers provide ample evidence to conclude that in most urban, high crime areas the police on patrol extract a fairly large amount of booty (in addition to minor free meals and cigarettes). Reiss' examination revealed that in the three cities studied the overall average of criminal violations (including all felonies and misdemeanors except assaults on citizens) committed by the officers observed was 20.7 violations per 100 officers. There was some variation in the rate and in the violations most frequently committed in each of the three cities. But in general, "[e]xcluding any participation in syndicated crime, roughly one in five officers was observed in criminal violation of the law."[9]

Reiss is not interested in profering moral indignation but rather in exploring the nature of these violations and the reasons they are permitted to persist at such high rates. The major violation is illegally obtaining merchandise and money. Reiss interprets these violations as means for officers to augment their incomes. In return for these benefits the officers usually grant exemption from the enforcement of certain provisions of the law.

Another contributing cause of police corruption is the structure of promotion within most departments. Since promotion occurs almost solely within local police departments, the commanding officers may have engaged in the same practices when they were patrolmen (or knew fellow officers who did) and are therefore more easily drawn into collusion with or toleration of the illegal practices of patrolmen. The current lack of lateral mobility leaves

8 P. 177.
9 P. 156.

police departments open to many forms of internal subversion such as corrupt practices. Lawmakers and city officials would do well to encourage a department to recruit staff officers from outside its own ranks to alleviate some of these problems.[10]

The current calls for greater civic accountability of the police run along two lines: for civilian review boards independent of the police department organization and for community control of the police whereby citywide commands are subdivided into several smaller commands.

The issue of community control of the police advocated by sociogeographically bound ethnic groupings in central cities, however, is not a straightforward police question. There is a fundamental paradox at the heart of this issue — accountability is really a question of how citizens can protect themselves from police tyranny without sacrificing effective protection. The possibilities for such tyranny emerge not only from centralized citywide police commands, but also from decentralized, nonuniform law enforcement in small locales.

This second form of tyranny was historically examined by Reiss. The local police systems of the United States during the nineteenth century were very open to the pressures of political partisanship from local political elites and interest groups based on the spoils system. Police officers were recruited and promoted at the behest of these local political elites, and they served without tenure. The captain of a local police precinct was more beholden to the political powers in his ward than to any superior officer in the police department. Political reformers of the early twentieth century attempted to break up local political satrapies and their close connections with police precincts. In large measure they succeeded. The merit system replaced electoral spoils for deciding tenure; commanders were appointed; and the control of the centralized, citywide command was increased. In sum, there was an increase in the calibre of police officers.

Citizens were now less vulnerable to the arbitrary treatment and petty harrassment they might have suffered from politically

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10 The fact that increasing numbers of police departments no longer require officers to live in the city in which they work may make it easier to recruit and promote officers from other departments.

enforced police precincts. But, while the centralized citywide command protected citizens from being vulnerable to local police tyranny, it deprived them of mechanisms for civic accountability of the police that they previously possessed. Police officers were no longer responsible to locally elected officials who had to be open to the criticisms and demands of the citizens in the precinct; the citywide command and its bureaucracy were only indirectly accountable to citizens through the few elected officials with powers to appoint police chiefs. This loss of civic accountability at the lower (community) levels of government was reflected in alterations in patterns of recruitment. In the previous period, as particular immigrant groups gained control of local political machines in certain areas, they were able to recruit officers of the same background. In the current, centralized police bureaucracy recruitment and most other features of the organization are internally controlled and subject to fewer outside influences. In large part, then, the local political mechanism is no longer available as a means of achieving civic accountability. The minority groups and others in urban areas who are calling for community control of police are not satisfied with the present levels of civic accountability available in the centralized citywide police departments.

Reiss argues that in the present situation of our bureaucratized metropolitan police departments, civic accountability rests on three assumptions: (1) that elected political figures can be made accountable for the actions of persons in the police bureaucracy; (2) that this bureaucracy is able to set up procedures that can deal fairly with citizens seeking a redress of grievances; and (3) that civil servants such as police officers are themselves reponsive to the public.[11]

For a variety of reasons, however, the above assumptions fail to produce an effective system of civic accountability. For instance, while bureaucracy tends to induce civil servants to use discretion in their dealings with citizens by requiring actions to be taken on

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11 With regard to all public bureaucracies, citizens also have the possibility of initiating civil suits against public officials, obtaining a warrant from the prosecutor for violations of the criminal code, or getting a writ of mandamus. However, writs of mandamus are not often issued against the police because the actions of officers are considered by the courts to involve ministerial discretion, and, hence, to be inappropriate for mandamus. P. 188.

the basis of formal, universally applicable, and neutral rules, this very set of rules obviates the power of citizens to influence these bureaucracies and hold the individual public servants accountable. The courts have been fairly consistent in their affirmation of the civil service tests and other formal practices used in police bureaucracies to decide entrance and promotion. It is such traditional practices that have largely prevented blacks and other minority group members from gaining entrance to municipal police forces despite their large proportion in the urban population.[12]

How, then, should persons interested in establishing mechanisms of civic accountability of the police proceed if they desire both (1) to maintain professional standards of police conduct and to keep up officer morale, by allowing police departments to keep their cherished professional right to establish order and discipline within their own organization, and (2) to prevent concomitantly the internal auditing privilege from negating all efforts to make police externally accountable to the citizenry? If there is to be a system of accountability it must recognize certain limitations in present arrangements that have already been attempted. One major limitation occurs in systems that rely on internal mechanisms of control whereby the citizens make their complaints against the police through the police department itself. Clearly the police are not neutral to complaints against their own men. Reiss correctly emphasizes that a system "whereby complaints are lodged with the guardians of offending parties inevitably coerces many clients against their interests."[13] Understandably, citizens will have cause to worry that their complaints at worst may bring police retaliation and harrassment and at best are likely to be summarily dispatched or swallowed by the department's bureaucracy.

There are also limitations in mechanisms of accountability that rely on external agencies to process citizen complaints. For criminal violations citizens may lodge a complaint with the public prosecutor; for non-criminal matters citizens may lodge complaints with other elected officials. Yet neither of these groups of public

12 Reiss notes that the only instances of major United States cities opening the ranks of their police departments to large proportions of Blacks — Philadelphia, Washington, and Chicago — occurred only after local political pressure was able to "neutralize" the strength of the bureaucracy. P. 189.

13 P. 190.

servants is structured to handle such complaints. Despite the limitations in the capacity of these external agencies, a viable system of accountability seems to require that complaints of citizens be made to an agency independent of the one about which the complaints are being made.

Reiss demonstrates that the external agency that recieves citizens' complaints, if it is to be effective in its mission of enhancing civic accountability, should not have the power to judge the police and impose sanctions on individual officers; for if police officers are to be accorded due process and citizen complaints are heard and decided on the basis of legal procedure, many complaints will be found insupportable on procedural grounds. For example, in citizen charges of undue use of force the only available testimony is that of the citizen and the officer; other citizen bystanders are unlikely to serve as witnesses and other police officers are easily discounted as biased.[14]

For an optimal system of civic accountability which combines the advantages of internal and external agencies, Reiss advises separating the functions of receiving complaints and processing them. One independent agency would receive all citizen inputs and transmit the complaints to the agency responsible; this same independent agency would have responsibility of monitoring the results of the complaints and producing a transcript of the outcomes of investigations. The task of investigating the issues, prescribing punishments for offenses, and adjudicating the complaints would be delegated to the specific public agency involved such as the police department. The independent external agency would serve as an accounting officer; its power would reside in its control of information with the right to transmit this information to citizens involved in complaints and to public channels of communication. While there is a risk that delegating the task of investigating complaints and prescribing punishments to the agency complaining about may result in that agency's dragging its feet in the investigation, Reiss identifies significant advantages that citizens and legislators ought to note: (1) professional responsibility of police offiers is enhanced when the investigation is performed by their peers who are qualified to evaluate the real constraints on the exercise of discretion; (2) police officers are more likely to

14 P. 184.

cooperate with investigators internal to the department; and (3) changes as a result of citizen complaints are more likely to be achieved if the police department staff helps to frame the recommendations.[15]

The effectiveness of the independent agency to enhance civic accountability of the police is predicated on its control of information. By maintaining a record of each complaint the agency will provide citizens with a means of learning whether their grievance has received attention. An additional power this external agency would possess is its control of aggregate information about the number of complaints and their disposition; such pooled information would provide significant evidence for any individual citizens or organizations interested in pressing a complaint or in seeking changes in police procedures.

Reiss repeatedly emphasizes the nexus between control over information and power to effect changes. He makes two further recommendations that would be useful to those interested in establishing a system of civic accountability of the police. First, there should be only one independent agency charged with the task of receiving citizen complaints about municipal bureaucracies, rather than one agency to monitor police complaints and others to monitor the complaints against other agencies. The purpose behind such centralization is to enhance the visibility of the single agency and thereby increase its effectiveness.[16] Secondly, citizens should be given a "receipt of contact" for each of their encounters with police officers which refers to all police-citizen contacts, not just arrests and bookings (at which citizens are also not given any official document for their own records). The receipt would cover citizens' complaints to police departments. It is Reiss' claim that a necessary requirement for accountability is that a citizen's complaint not become the sole property of the police department against which it is made.[17]

Finally, Reiss and his coworkers surveyed citizen attitudes about

15 P. 194.

16 Pp. 196-97.

17 The suggested items to be covered in the receipt include: (1) citizen's name and address; (2) shield number of the officer; (3) the place of contact; (4) whether an automobile was involved; (5) a description of citizens' rights in encounters with police officers; (6) a statement that the citizen was informed of these rights; (7) the telephone number and other information about the agency where the citizen might call to make complaints or to ask questions. Pp. 205-06.

law enforcement and policemen. These surveys are more interesting for what they did not find, *e.g.*, belief in the corruptibility and possible malfeasance of state police or federal agents. Reiss notes with irony that Americans do not even class together state police and FBI agents with "cops." Those who would seek to correct alleged abuses by the former two would run into stiff opposition, Reiss reports, because citizens were offended merely to be asked hypothetical questions about corruption and abuse of power with regard to these state and federal officers.

On the whole, Reiss' study is highly provocative and represents a genuine contribution to the literature. Two criticisms should, however, be offered. First, Reiss does not cover in detail police involvement in the judicial process, even though he does explain officers' understanding of the plea bargaining engaged in by the prosecuting attorney and how their knowledge figures into their discretionary decision whether to strictly enforce the law.[18] Secondly, in his emphasis on the interdependence of police effectiveness and citizen support Reiss overestimates the subversive capacity of the citizenry on the police. This capacity is rarely realized, least of all by citizens in the racial and ethnic minorities in high crime areas of American cities.

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18 *See* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).